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## Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others

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# CRIES AND WHISPERS: ENVIRONMENTAL HAZARDS, MODEL RULE 1.6, AND THE ATTORNEY'S CONFLICTING DUTIES TO CLIENTS AND OTHERS

Irma S. Russell\*

**Abstract:** This Article explores the attorney's duty of confidentiality in the context of environmental dangers, examining the history and purpose of the duty and the model ethical rule that controls issues of confidentiality, Rule 1.6 of the *Model Rules of Professional Conduct* ("Model Rules"). Important scholarship has criticized Model Rule 1.6, but that scholarship has not explored the effects of the Rule in the area where the stakes are highest: environmental catastrophes. The Article analyzes the Rule's text, commentary, and legislative history and discusses the two predominant views of the attorney in our society, the attorney as champion and as officer of the court. Next, the Article considers these conceptualizations of the attorney's role as they relate to the issue of confidentiality and Rule 1.6, concluding that the view of the attorney as a champion pervades the *Model Rules*. This Article contributes to the debate regarding Model Rule 1.6 by charting the Rule's inexorable momentum toward silence and questioning the social utility of such silence when a client's conduct threatens serious harm. The Article poses the issue of a domestic-Bhopal as a way of contextualizing the duty and balance of considerations created by Model Rule 1.6. This catastrophic context is set not to argue for an environmental exception to the Rule but rather to test the prohibition against disclosure in the extreme circumstance of widespread harm. An environmental disaster presents cumulative harm and thus calls for reassessment of the categorical nature of Rule 1.6. Although grave harm can result from negligent or fraudulent conduct, and tort law may impose liability for creating these risks, such considerations do not result in a viable exception under the ethical rule. Rule 1.6 includes an exception to the duty of silence when a client threatens criminal conduct likely to result in serious harm to others. However, this exception fails to provide adequate protection for third parties because the crime requirement derails consideration of the threatened peril. Finally, the Article proposes substitute language for the Model Rule to balance the dual risks of improvident disclosure and improvident silence.

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I. INTRODUCTION	

You know that your client has created an environmental danger that threatens the community where you live—by a release or imminent release of a toxic substance, for example. When you counsel your client to report the danger, he refuses and threatens reprisals if you reveal

anything.<sup>1</sup> Despite the threat of harm, the rules of ethics bind you to remain silent if the danger arises from negligence rather than from a criminal act.<sup>2</sup> This realistic nightmare presents a true moral dilemma<sup>3</sup> and a tough problem of professional ethics.<sup>4</sup> It provides context for understanding the conflict between two compelling duties: (1) the duty of the attorney to preserve the confidences and secrets of a client, and (2) the moral duty to warn another of a significant threat.

Fulfilling one duty seems necessarily to result in a violation of the other. This conflict is far from new. However, the gravity of the consequences posed by a potential environmental catastrophe presents the problem in a new context and challenges assumptions about the appropriate balance between the two duties. Environmental hazards provide a useful framework for evaluating Rule 1.6 not because they deserve separate treatment but rather because they force evaluation of the underlying assumptions of the absolute nature of the Rule. A potential environmental catastrophe threatens an aggregate harm, demanding consideration alongside the aggregate benefit of the duty of

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1. "Virtually every American jurisdiction forbids attorneys to disclose client information. The professional codes vary in their edicts, ranging from nearly absolute prohibitions on attorney disclosures to general rules containing significant exceptions." Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 352 (1989).

2. Extensive environmental reporting requirements now mandate reporting discharges of hazardous wastes. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9603(a) (1994); 33 U.S.C. § 1342(a)(2) (1994); 40 C.F.R. § 263.30 (1996) (implementing Resource Conservation and Recovery Act); see also Kathleen F. Brickley, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 Tulane L. Rev. 487, 512 (1996) (describing self-reporting scheme employed in federal environmental laws). Violation of such requirements can be a crime. See, e.g., 33 U.S.C. § 319(c) (1994); 42 U.S.C. § 7413(C)(2)(a) (1994). The nightmare hypothetical set forth here intentionally leaves uncertain the basis of a duty to disclose to focus on the issue of peril and to reflect the uncertainty often present in cases of environmental hazards.

3. A dilemma is defined as "a situation requiring a choice between equally undesirable alternatives." *The Random House Dictionary of the English Language* 411 (college ed. 1968).

4. Scholars have questioned the efficacy of the professional codes of lawyers.

What are the ethical priorities of the legal profession? Do the codes of ethics and miscellaneous rulings by which lawyers order their professional lives have anything to do with the presumptive moral concerns of the average citizen for fairness, justice and truth-seeking? Or does the rubric "legal ethics" comprise, rather a collection of arcane rules and restrictions well designed to promote ultimately the pecuniary interests of the legal profession through narrow pursuit of adversary advantage and monopolistic control of services?

John Lorentz, *Conscience, Conduct, and the Bar: The Formal and Informal Opinions of the A.B.A. Committee on Ethics and Professional Responsibility 1924-1976*, at 1 (1979); see also David S. Caudill, *Sympathy for the Devil?: Reflections on the Crime-Fraud Exception to Client Confidentiality*, 8 St. John's J. Legal Comment. 369 (1993) (considering tension between constructive and actual ethics); Max Radin, *The Ancient Grudge: A Study of the Public Relations of the Legal Profession*, 32 Va. L. Rev. 734 (1946).

confidentiality to society and the legal system.<sup>5</sup> Moreover, changes in tort law, including the abrogation of the bar of privity and the emergence of a duty to warn, challenge the concepts of professionalism that undergird the *Model Rules*.

Like all attorneys,<sup>6</sup> mental health professionals,<sup>7</sup> and many other professionals,<sup>8</sup> lawyers engaged in environmental practice have a duty to maintain the confidences and secrets of their clients.<sup>9</sup> The current standard of confidentiality enunciated by the American Bar Association (ABA) is set forth in Rule 1.6 of the *Model Rules of Professional Conduct* ("*Model Rules*").<sup>10</sup> The duty to third parties may be imposed by statute,<sup>11</sup> the common law,<sup>12</sup> or by the conscience of the lawyer.<sup>13</sup>

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5. An alternative analysis compares the risks associated with both silence and disclosure.

6. The ethical rules of a jurisdiction are generally held to apply to in-house corporate counsel and counsel representing organizations as well as attorneys in private practice. See *Model Rules of Professional Conduct* Rule 1.13 cmt. 3 (1994); Tenn. Supreme Court Bd. of Professional Responsibility, Formal Op. 83-F-52 (1983).

7. See, e.g., *Jaffee v. Redmond*, 116 S. Ct. 1223, 1224 (1996) (recognizing psychotherapist privilege based on need for confidential communications for successful treatment and to serve public interest by enhancing "mental health of the Nation's citizenry").

8. See *Canfield v. Sandock*, 563 N.E.2d 526 (Ind. 1990) (recognizing physician-patient privilege by holding documents not subject to discovery); Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* 116 (1982) ("Doctors, lawyers, and priests have traditionally recognized the duty of professional secrecy regarding what individuals confide to them: personal matters . . . that patients or clients want to share with someone, yet keep from all others."); see also Robert I. Field, *Overview: Computerized Medical Records Create New Legal and Business Confidentiality Problems*, HealthSpan, Sept. 1994, at 3, 4 (noting that when taking Hippocratic oath, physician declares "[w]hatever in connection with my professional practice or not in connection with it I see or hear in the life of men which ought not to be spoken abroad I will not divulge as recommending that all such should be kept secret").

9. A lawyer is bound to preserve the confidences and secrets of the client in addition to exercising skill and knowledge in serving the client's cause. See *Model Rules of Professional Conduct* Rule 1.6 (1994); *Model Code of Professional Responsibility* DR 4-101 (1980).

10. *Model Rules of Professional Conduct* Rule 1.6. Although 39 jurisdictions have adopted the *Model Rules*, only seven states did so without modification. See *infra* Part IV.

11. See, e.g., CERCLA, 42 U.S.C. § 9603 (1994) (reporting requirements). Most environmental statutes require the owner or operator who has caused a release of a hazardous substance to report the release to the Environmental Protection Agency (EPA) or to the state agency authorized to regulate the substance involved. See, e.g., 42 U.S.C. § 9603(a). Statutes may state a duty to protect or restore the environment but leave the resolution of liability to the common law. See, e.g., 42 U.S.C. § 7412 (1994) (refusing to create basis for liability for "compensation for bodily injury or any other injury or property damages to any person which may result from accidental releases"); CERCLA, 42 U.S.C. § 9607 (1994) (creating liability for cleaning up hazardous waste site but leaving liability for personal injury to common law). Statutes can place the responsibility of reporting on "any person" having knowledge of the condition. See N.J. Stat. Ann. § 58:10A-21 to -37 (West 1990) (New Jersey Underground Storage Tank Act); see also J. Randolph Evans & Ida Patterson Dorvee, *Attorney Liability For Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. Rev. 803 (1994); *Hazardous Advice: Lawyer, Firm Prosecuted for Telling Client Not to Clean Up Waste*, ABA J., Sept. 1991, at 16, 16 (discussing

Each of these duties is other-regarding in that each seeks to further societal goals rather than to advance advancing isolated interests of particular groups or individuals. Environmental laws, including requirements that hazardous releases be reported, are predicated on a legislative judgment that they are necessary to protect the health of members of society and the environment upon which society depends. Likewise, the duty of confidentiality serves more than the individual client. It serves the system of justice as a whole by providing confidentiality to all individuals in need of representation,<sup>14</sup> enhancing the adequacy of representation, and encouraging clients to comply with the law.<sup>15</sup> Similarly, in protecting the autonomy of the individual client,<sup>16</sup> the attorney serves the cumulative good, providing protection to clients in the aggregate.<sup>17</sup>

When an attorney knows of a significant environmental danger created by a client<sup>18</sup> who refuses to report or correct the condition, which

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felony charges filed against eight attorneys on theory that letter abandoning their client's laboratory constituted illegal disposal of hazardous wastes).

12. See W. Probert & R. Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 Notre Dame L. Rev. 708 (1980).

13. Both the *Model Rules* and the *Model Code of Professional Responsibility* refer lawyers to conscience for the process of resolving conflicts. See Center for Prof'l Responsibility, American Bar Ass'n, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* 12 (1987) [hereinafter *Legislative History*]; *Model Code of Professional Responsibility* pmbl. (1983) ("Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards.").

14. See 1 Edward M. Thomson, *A Treatise on Attorneys at Law* 159 (1914). As Thorton explains:

The idea that seems to be involved in [the rule's] establishment is not that of mere secrecy. . . .

[I]t is founded on altogether a different principle. Having respect solely to the free and unembarrassed administration of justice, and to the security of all men in the enjoyment of their civil rights . . . .

*Id.*

15. The *Model Rules* do not, of course, go so far as to condone perjury or to allow the attorney to aid a violation of the law. The argument set forth in Part III is that, although the duty of confidentiality is intended to serve social utility, the ABA's most recent enunciation of the duty creates a categorical imperative of attorney silence, merging the identity of this subsidiary good (confidentiality) with the absolute of social utility.

16. For a discussion of the attorney's role in enhancing client autonomy, see Monroe Freedman, *Professionalism in the American Adversary System*, 41 Emory L.J. 467 (1992).

17. *Id.* at 471.

18. When the client is a corporation, the attorney has an obligation to seek a hearing on the problem at higher levels of the corporation when intermediate officials refuse to comply with the law. See *Model Rules of Professional Conduct* Rule 1.13 (1994). The introductory nightmare scenario assumes that the official with ultimate authority has decided to continue the disputed conduct that creates a risk of harm.

duty should predominate—the duty to maintain the confidences of the client or the duty to avert a danger to the community or an individual? A variety of factors exacerbate this dilemma for attorneys, including the growing risk of tort liability for professionals who fail to warn non-clients of dangers<sup>19</sup> and the ambiguity of many environmental laws.<sup>20</sup> Thus, an attorney may be caught in a “Catch-22”<sup>21</sup> situation in which she is forced to choose between revealing information against a client’s wishes or facing potential tort claims from those injured by the client’s activities.<sup>22</sup>

This dilemma is not farfetched. “Chemical accidents with serious effects have become commonplace in the United States.”<sup>23</sup> Although the United States has not experienced the kind of catastrophe that befell the thousands of people killed or injured by a chemical release from a Union Carbide plant in Bhopal, India,<sup>24</sup> the United States has narrowly escaped

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19. See generally Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* (3d ed. 1989); Mary P. Ellis, *Attorney Liability to Non-Clients*, 17 Colo. Law. 1537 (1988); Donald B. Hilliker, *Attorney Liability to Third Parties: A Look to the Future*, 36 DePaul L. Rev. 41 (1986); Marc I. Steinberg, *Attorney Liability Under Securities Laws*, 45 Sw. L.J. 711 (1991).

20. Additionally, criminal sanctions apply to a knowing failure to disclose violations of environmental laws, heightening both the significance of compliance and the need for accurate judgments by attorneys concerning whether information is confidential. Numerous enforcement actions are lodged each year by the EPA, citizen groups, and state and federal prosecutors. See, e.g., 15 U.S.C. § 2615(a) (1994) (providing civil and criminal penalties for commercial use of certain toxic substances); 33 U.S.C. § 1319(c) (1994) (establishing criminal penalties for those who pollute navigable waters); 42 U.S.C. § 7413(c) (1994).

21. “Catch 22” is defined as “a paradox in a law, regulation, or practice that makes one a victim of its provisions no matter what one does.” *Webster’s New World Dictionary* 224 (2d college ed. 1980). The term was made popular by Joseph Heller’s novel of the same name. See Joseph Heller, *Catch-22* (1961).

22. Attorneys have legitimate concerns about potential tort liability to non-clients as well as to clients. See, e.g., Jonathan J. De Jong, *Attorney Liability to Third Party Non-Clients*, 5 Kan. J.L. & Pub. Pol’y 161 (1995); Marc I. Steinberg, *Attorney Liability for Client Fraud*, 1991 Colum. Bus. L. Rev. 1. An attorney may face liability for failing to disclose information when he has personal knowledge of dangers or information sought by agencies. See Robert G. Day, *Administrative Watchdogs or Zealous Advocates? Implications for Legal Ethics in the Face of Expanded Attorney Liability*, 45 Stan. L. Rev. 645, 669–70 (1993); see also Brian W. Smith & M. Lindsay Childress, *Avoiding Lawyer Liability in the Wake of Kaye, Scholer*, 8 St. John’s J. Legal Comment. 385 (1993); Steinberg, *supra* note 19, at 711.

23. S. Rep. No. 101-228, at 134 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3519; see also Bradford C. Mank, *Preventing Bhopal: “Dead Zones” and Toxic Death Risks Index Taxes*, 53 Ohio St. L.J. 761, 761 (1992) (arguing that government should “encourage industry to substitute less harmful chemicals or store smaller quantities of toxic materials”); *Pesticides: Chemical Firms Agree To Pay \$21 Million Toward Cleanup of Fresno’s Drinking Water*, 10 Toxics L. Reprtr. (BNA) 9 (June 7, 1995).

24. See *Anniversary of a Tragedy (Bhopal, India Death Gas Leak)*, Time, Dec. 16, 1985, at 42, 42; *Bhopal Gas Leak Is Still Causing Illness in India*, Baltimore Sun, Dec. 18, 1996, at 19A; *Worst*

catastrophes more dire—without significant publicity about these near misses.<sup>25</sup> According to a study by the EPA, between 1982 and 1986, seventeen accidental chemical releases within U.S. borders would have resulted in consequences as catastrophic as Bhopal but for the location of the plants and favorable conditions.<sup>26</sup>

In the scenario set forth above, the applicable rule of ethics of the ABA model<sup>27</sup> appears to allow an attorney to remain silent despite significant danger to the public or to an individual.<sup>28</sup> The central thesis of this Article is that society has a critical interest in the balance struck between these conflicting duties and in encouraging lawyers to assess environmental dangers rather than blindly adhering to an ethic of silence. The Article assesses the operation of Model Rule 1.6 in light of environmental catastrophes and concludes that the realities of environmental dangers demand reassessment of the ABA rule on confidentiality.<sup>29</sup>

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*Is To Come With Bhopal Gas Leak, Official Says*, News Trib. (Tacoma, Wash.), Dec. 18, 1996, at A12.

25. S. Rep. No. 101-228, at 134 (1989), *reprinted* in 1990 U.S.C.C.A.N. 3519-20.

26. *Id.* at 134-35. As the Senate Report explained:

In response to Bhopal, the Environmental Protection Agency began several efforts to determine the scope of the chemical accident problem including compilation of an "Acute Hazardous Events Data Base" (AHE/DB). . . . In August of 1988 EPA prepared an update (which was released on April 8, 1989) covering 11,048 events in the United States involving the accidental release of extremely hazardous substances between 1982 and 1986. These [American] events caused 309 deaths, 11,341 injuries and the evacuation of 464,677 people from homes and jobs. . . .

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. . . EPA analyzed 29 events with the highest potential for damage to health and the environment. These events were compared to the release at Bhopal, India which killed 3,000 and injured over 200,000. Considering only the toxicity and volume of the chemicals released in the 29 U.S. events, 17 of these events had the potential for more damage than Bhopal and all 29 had a potential of 50 percent or more of the Bhopal effects. That few were killed or injured in these accidents (650 people were injured in one event and 5 killed in another) is due principally to the location of the facilities and climate and operating conditions at the time of the release.

*Id.*

27. *Model Rules of Professional Conduct* Rule 1.6 (1994).

28. Although the Rules prohibit disclosure generally, they do permit disclosure "to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." Rule 1.6(b)(1). Even then, the Rule does not require or encourage disclosure. Rule 1.6(b)(1). Positive law may require disclosure of a hazardous release. Whether such a mandate of statutory law requires the attorney to disclose the release depends on the scope and intent of the statute.

29. An ethic of silence is memorialized in the current rules of professional ethics governing lawyers. Though there are variations in the rules, most jurisdictions have adopted the *Model Rules*



Part II of this Article recounts the history and purpose of the duty of confidentiality. Part III examines the text, commentary,<sup>30</sup> and legislative history of Model Rule 1.6. Part IV discusses modifications to Rule 1.6 by states that have adopted the *Model Rules*. Part V examines two predominant views of the attorney (as champion and as officer of the court) as they relate to the issue of confidentiality. Part VI assesses Rule 1.6 in light of these conceptualizations of the attorney's role, concluding that the model of the attorney-champion pervades the *Model Rules*. Part VII surveys the interaction between the ethical rules and environmental dangers. Finally, Part VIII suggests a reconceptualization of Rule 1.6 to weigh the risks of attorney silence against the risks of attorney disclosure.

## II. HISTORY AND PURPOSE OF THE DUTY OF CONFIDENTIALITY

The duty of confidentiality has been said to be "an expression of the agent's duty to protect the principal's interests."<sup>31</sup> The concept may be a necessary adjunct to established principles, such as the attorney's duty of loyalty to the client<sup>32</sup> and the need for the free flow of information between clients and attorneys.<sup>33</sup> Moreover, the duty is integral to the client's personal autonomy.<sup>34</sup> Disclosures that may not be compelled

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which includes a statement that an attorney's decision to remain silent is not a violation of the rule on confidentiality. See Rule 1.6 cmt. 13.

30. "Commentary" includes the comments, the Preamble, and the Scope section of the *Model Rules*.

31. See Robert H. Aronson et al., *Professional Responsibility: Problems, Cases, and Materials* 222 (2d ed. 1995). Of course the duty is also tied closely to the evidentiary privilege against disclosure of client confidences. *Id.*; see also 1 Thorton, *supra* note 14, at 158-60. Thorton devoted a chapter of his treatise to the topic of "Privileged Communications," including within the chapter both evidentiary issues and the general rule against disclosure. See *id.* at 153-227.

32. See Charles W. Wolfram, *Modern Legal Ethics* § 6.7.3, at 301 (1986). For a fuller treatment of the history of the duty of confidentiality, see Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091 (1985).

33. See Wolfram, *supra* note 32, § 6.7.3, at 300; see also 1 Thornton, *supra* note 14, at 162 (noting that "some courts favor a liberal construction [of the Rule] on the theory that one consulting a lawyer should be encouraged to communicate all the facts without fear that his statements may possibly be used against him in the future").

34. The principle of confidentiality "creates a zone of privacy that cannot be breached by a too-inquisitive government, and thus enhances the autonomy and individual liberty of citizens." See 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.6:101, at 120.1 (Supp. 1977). Observing that the duty of confidentiality "is founded on altogether a different principle" than "mere secrecy," Thornton traced the duty of confidentiality to the personal right of an individual litigant.

from a defendant under the privilege against self incrimination should not be compelled from the defendant's attorney.<sup>35</sup> On the other hand, the duty of confidentiality traditionally has not been viewed as an absolute.<sup>36</sup> The duty does not require an attorney to assist a client's fraud or to allow it to go unpunished.<sup>37</sup>

Counsel's duty of loyalty to, and advocacy of, the defendant's cause is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain his client's objectives, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.<sup>38</sup>

The ABA's first statement of the duty of confidentiality appeared in Canon 37 of the *Canons of Professional Ethics*. It provided, "It is the

[N]o man is under a legal obligation to disclose facts or circumstances which would render questionable his demand for a particular right, or impair his defense to another's demand. Originally, suitors and defendants appeared personally before the tribunal which interpreted and administered the law. Subsequently . . . the procurement of the services of persons skilled in the law became universal. No man being compelled himself to disclose the weakness of his case, it followed, almost as a necessary consequence, that the person who represented him, and presented that case, could not do so. If it were otherwise, the free administration of justice would be restricted, and the ascertainment and enforcement of rights endangered.

1 Thornton, *supra* note 14, at 159-60.

35. See *Fisher v. United States*, 425 U.S. 391 (1976); see also David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. Rev. 443 (1986). As Fried explains:

There is little moral difference between convicting a client by testimony compelled from his or her own mouth and convicting a client by testimony compelled from his or her attorney's mouth. This view may be called the "intrinsic value" theory of the privilege. It is probably the view held by most working attorneys.

*Id.* at 492.

36. See *Nix v. Whiteside*, 475 U.S. 157 (1986) (holding that trial lawyer's admonition to defendant not to commit perjury and threat to withdraw and disclose false testimony did not deny defendant constitutional right to effective assistance of counsel); see also 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:109, at 168.1 (Supp. 1996) (noting that duty has never been regarded as "unqualified rule"); Wolfram, *supra* 32, § 6.1, at 245 (noting that privacy justifications do not justify "an unqualified privilege").

37. See *Model Rules of Professional Conduct* Rule 1.2 (1994). Additionally,

[w]hen a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

*Canons of Professional Ethics* Canon 41 (1908).

38. *Nix*, 475 U.S. at 158.

duty of a lawyer to preserve his client's confidences."<sup>39</sup> This Canon excluded a client's intended crime from the definition of confidences: the "announced intention of a client to commit a crime is not included within the confidences which [an attorney] is bound to respect."<sup>40</sup>

In 1969 the ABA superseded the *Canons*<sup>41</sup> by its adoption of the *Code of Professional Responsibility*.<sup>42</sup> Under the *Code*, the duty encompasses<sup>43</sup> client confidences and secrets.<sup>44</sup> It is a violation of the *Code* for a lawyer to use or to reveal such information.<sup>45</sup> The *Code* allows disclosures

39. *Canons of Professional Ethics* Canon 37 (1908). The ABA adopted the *Canons of Professional Ethics* at its annual meeting on August 27, 1908, declaring that "the stability of the Courts and of all departments of government rests upon the approval of the people." Center for Prof'l Responsibility, American Bar Ass'n, *Model Rules of Professional Conduct* vii (3d ed. 1993).

40. *Canons of Professional Ethics* Canon 37. Further, the text of Canon 37 allowed disclosures that "may be necessary to prevent the act [crime] or to protect those against whom it is threatened." Canon 37; see also ABA Comm. on Professional Ethics and Grievances, Formal Op. 154 (1936). Other provisions of the *Canons* dealt with questions related to the duty of confidentiality, moderating the duty to the client with duties to others and society at large. See, e.g., *Canons of Professional Ethics*, Canon 15 ("How Far a Lawyer May Go in Supporting a Client's Cause"); Canon 16 ("Restraining Client from Improprieties"); Canon 22 ("Candor and Frankness") (1908); see also Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 Yale L.J. 1239, 1247 (1991) (noting that *Canons* handled client crime or fraud "in complicated and perhaps equivocal terms").

41. See Wolfram, *supra* note 32, app. B, at 1021.

42. In 1978 the ABA added the designation "Model" to the title of the *Code* in compliance with a settlement agreement it entered with the Justice Department to resolve antitrust charges. See Wolfram, *supra* note 32, § 2.6, at 57.

43. Although the *Code* was later superseded by the *Model Rules*, see *infra* text accompanying note 49, the present tense is used here because the *Model Code* continues in force in roughly one-fifth of the states. At this writing, the following states follow the *Model Code* in defining attorney-client confidentiality: Georgia, *Ga. Code of Professional Responsibility* DR 4-101 (1996); Iowa, *Iowa Code of Professional Responsibility* DR 4-101 (1996); Massachusetts, *Mass. Canons of Ethics* DR 4-101 (1996); Nebraska, *Neb. Code of Professional Responsibility* DR 4-101 (West 1995); New York, *N.Y. Code of Professional Responsibility* DR 4-101 (1995); Ohio, *Ohio Code of Professional Responsibility* DR 4-101 (Banks-Baldwin 1996); Oregon, *Or. Code of Professional Responsibility* DR 4-101 (1996); Tennessee, *Tenn. Code of Professional Responsibility* DR 4-101 (1995); Vermont, *Vt. Code of Professional Responsibility* DR 4-101 (1995); and Virginia, *Va. Code of Professional Responsibility* DR 4-101 (1996). Vermont, however, is considering adoption of the *Model Rules*. See generally A. Jeffry Taylor, Essay, *Work in Progress: The Vermont Rules of Professional Conduct*, 20 Vt. L. Rev. 901 (1996).

44. See *Model Code of Professional Responsibility* DR 4-101 (1980). Disciplinary Rule 4-101 of the *Code* defines client confidences and secrets and prohibits attorneys from disclosing either except in specified instances. It defines "confidences" as "information protected by the attorney-client privilege under applicable law" and "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would likely be embarrassing or detrimental to the client." See *Model Code of Professional Responsibility* DR 4-101(A).

45. See *Model Code of Professional Responsibility* DR 4-101(B).

permitted by the Disciplinary Rules,<sup>46</sup> or required by law or court order.<sup>47</sup> It also permits an attorney to reveal "the intention of his client to commit a crime and the information necessary to prevent the crime."<sup>48</sup>

In 1983, after lengthy study and debate,<sup>49</sup> the ABA adopted the *Model Rules of Professional Conduct*. The *Model Rules* provide the current statement of the ethical obligations of attorneys by the leading professional association for lawyers in the United States, the ABA.

### III. MODEL RULE 1.6

Model Rule 1.6 is the ABA's current statement of the attorney's duty of confidentiality. Although thirty-nine jurisdictions have adopted the *Model Rules*,<sup>50</sup> only a handful of those states accepted Rule 1.6 in unaltered form.<sup>51</sup> This part of the Article studies the text and comments of Rule 1.6 and concludes that although the Rule speaks in terms of balancing the interests of the client, the attorney, and others, the

46. The first exception requires balancing the duty of confidentiality against other professional duties, permitting the attorney to reveal a confidence when another section of the *Code* would allow the revelation. See, e.g., *Model Code* DR 4-101.

47. *Model Code of Professional Responsibility* DR 4-101(C)(2). The exception for disclosures "required by law" creates some uncertainties. It seems to include statutory mandates such as reporting requirements of environmental releases or hazards in addition to duties arising from tort law. See 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:113, at 168.9 (Supp. 1996) (noting that attorney "may take the view that he is required by 'law,' namely tort law or criminal law, to disclose preemptively client misdeeds in which the lawyer's services were used"). In the environmental arena, uncertainties of application abound. Statutes are often less than clear regarding the intended reach of the law creating reporting requirements. For example, CERCLA, 42 U.S.C. §§ 9601-9675 (1994), provides that "any person" may be required to furnish information to an officer, employee, or representative of the President. See 42 U.S.C. § 9604(e)(2) (1994) (emphasis added). Additionally, CERCLA's mandate that those in charge of a facility report a release of a hazardous substance reaches fairly low-ranking employees. See *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989) (interpreting CERCLA, 42 U.S.C. § 9603 (1982 & Supp. IV 1986)).

48. *Model Code of Professional Responsibility* DR 4-101(C)(3). The provision does not qualify the type of crime justifying disclosure. *Model Code* DR 4-101(C)(3); see Stephen Gillers & Roy D. Simon, Jr., *Regulation of Lawyers: Statutes and Standards* 55 (1995).

49. The process began in 1977 when the President of the ABA appointed Robert J. Kutak to be chair of the Kutak Commission. See Gillers & Simon, Jr., *supra* note 48, at ix. The Commission drafted Proposed Rules, which were debated and modified in sessions of the ABA House of Delegates of the Association and ultimately adopted on August 2, 1983. *Id.*

50. See *infra* note 172. Many jurisdictions have modified the *Model Rules*, especially Rule 1.6. See *infra* notes 180-189 and accompanying text.

51. See *infra* note 173. Uniformity among the states is particularly important with regard to the duty of confidentiality because the purpose of the rule is to communicate the standard to the public so that clients will feel confident in seeking representation and communicating openly with attorneys. See *Model Rules of Professional Conduct* Rule 1.6 cmt. 4 (1994).

momentum of the Rule results in a categorical imperative<sup>52</sup> or absolute rule of nondisclosure of client information.<sup>53</sup>

Model Rule 1.6 provides:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.<sup>54</sup>

Rule 1.6, the most debated rule before the ABA Commission,<sup>55</sup> continues to generate controversy today.<sup>56</sup> As finally adopted, Rule 1.6 enhances the ethic of attorney silence by expanding the universe of information within the duty of confidentiality, contracting the exceptions to the rule, and deleting any reference to positive law.

The central place of the duty of confidentiality is clear before one reads Rule 1.6. The Preamble to the *Model Rules* highlights the

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52. Others have noted the categorical nature of the duty. See, e.g., Albert Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?* 52 U. Colo. L. Rev. 349 (1981); Subin, *supra* note 32, at 1180.

53. This Article does not criticize the recognized duty to maintain the confidentiality of past actions when the consequences of those actions are complete. Rather, the Article assesses the duty of confidentiality as it relates to future peril for others. Likewise, the question of attorney sanctions under the Rule is beyond the scope of this Article.

54. *Model Rules of Professional Conduct* Rule 1.6.

55. See Robert H. Aronson, *Washington Survey: An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823 (1986); Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 Geo. L.J. 1015, 1017 (1981); Hazard, Jr., *supra* note 40; Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 Hofstra L. Rev. 311 (1990).

56. Aronson, *supra* note 55, at 831 (pairing Rule 1.6 with 3.3 as "most controversial" and "least justifiable" of *Model Rules*).

importance of confidentiality and underscores the prohibition: "A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law."<sup>57</sup> Like earlier statements of the duty of confidentiality, the *Model Rules* indicate that the primary goal of Rule 1.6 is to encourage clients to tell their attorney all facts relating to the representation.<sup>58</sup> A second goal is to encourage people to seek representation as early as possible.<sup>59</sup> The *Model Rules* assume that without a strong ethic of silence clients will not share important information with their attorneys.<sup>60</sup> This assumption, that lawyers must assure clients of confidentiality in order to obtain necessary information to represent them, has been challenged.<sup>61</sup>

The Rule's justification for the standard set for confidentiality is based on society's best interest. The duty is endorsed as serving the dual purposes of providing the individual client with full representation and of protecting the public by giving the attorney information necessary to dissuade the client from unlawful conduct likely to result in serious harm. Comment 3 to Rule 1.6 states, "Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."<sup>62</sup> Of course securing these benefits requires that potential clients (the public) understand the protection afforded by the rule;<sup>63</sup>

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57. *Legislative History*, *supra* note 13, at 12. The Preamble also acknowledges the importance of conscience in a lawyer's decision-making: "Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers." *Id.*

58. Comment 4 to Rule 1.6 states that the purpose of the Rule is to encourage clients to "communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." *Model Rules of Professional Conduct* Rule 1.6 cmt. 4. In arguing for deletion of the exception for fraudulent conduct likely to injure another, the consensus of the discussion of the ABA House of Delegates was that such an amendment "would encourage fuller and franker communication between a lawyer and client by narrowing the circumstances in which the lawyer could disclose client confidences." *See Legislative History*, *supra* note 13, at 48.

59. *Model Rules of Professional Conduct* Rule 1.6 cmt. 2 (stating that Rule 1.6 "not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal representation"); *see also* Tenn. Supreme Court Bd. of Professional Responsibility, Formal Op. No. 85-F-99 (1985).

60. Zacharias, *supra* note 1, at 352-53 ("The rules stem from common assumptions about our legal system: clients won't confide in lawyers without confidentiality; lawyers need it to represent clients effectively.").

61. *See* Wolfram, *supra* note 32, § 6.1.3, at 243 (1986) (noting absence of data to support assumption in context of attorney-client privilege).

62. *Model Rules of Professional Conduct* Rule 1.6 cmt. 3.

63. This goal creates a need for an understandable and uniform rule of confidentiality. Otherwise, the potential client will be unable to have confidence that his expectation of privacy

otherwise, the public will not be persuaded to seek legal advice and to disclose all relevant information to attorneys. Although the Rule may be tempered by other provisions of the *Model Rules*,<sup>64</sup> it advocates attorney silence in virtually all circumstances.<sup>65</sup> While the Rule does not state or assume that the attorney will be successful in dissuading the client from harmful conduct in every case, it justifies the mandate of silence on the basis of effective counseling in most.<sup>66</sup> In a world where harmful conduct is directed against individuals rather than the community or the nation at large, this system may seem to have utilitarian appeal. When widespread death and harm are possible (as a result of negligent handling of chemical or nuclear substances, for example) the danger of this balance becomes clear.

### A. *The Structure of the Rule*

#### 1. *Scope: Use of the Term "Information"*

The broad reach of Rule 1.6<sup>67</sup> heightens the concern for social utility in the face of dangers. The final version of the new rule rejected the terms "confidences and secrets" used in the *Model Code*<sup>68</sup> in favor of the

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will be carried out. Ambiguous rules or ones that vary from state to state will discourage potential clients. Currently, the public seems not to have a clear understanding of the duty of confidentiality and its exceptions. See Zacharias, *supra* note 1, at 394 (reporting survey results indicating "widespread misunderstanding of confidentiality . . . among clients").

64. These include Rule 2.2 ("Intermediary"), Rule 3.3 ("Candor Toward the Tribunal"), and Rule 4.1 ("Truthfulness in Statements to Others"). See *Model Rules of Professional Conduct* Rules 2.2, 3.3, 4.1 (1994). In a recent disciplinary hearing, the ABA Committee concluded that the lawyer's responsibility to disclose client perjury to the tribunal superseded the lawyer's duty of confidentiality. See generally Evans & Dorvee, *supra* note 11.

65. Although the Preamble to the *Model Rules* notes the preeminence of positive law, the momentum of Rule 1.6 seems to encourage silence without regard to dangers to third parties.

66. Although the duty of confidentiality has been traditionally justified by the need for representation of the individual and recognition of the autonomy of each person, the *Model Rules'* primary response to concerns about harm to others is that silence diminishes the likelihood of harm in most cases.

In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

*Model Rules of Professional Conduct* Rule 1.6 cmt. 9; see also *Model Rules of Professional Conduct* pmb. (1994); *Legislative History*, *supra* note 13, at 13.

67. See Wolfram, *supra* note 32, § 6.7.3, at 301 (identifying "prophylactic protection against lawyer misjudgments" as "only imaginable reason" for "universal prohibition" of Rule 1.6).

68. See *Model Code of Professional Responsibility* DR 4-101 (1980).

broader “information,” a term that embraces virtually all data relating to a client regardless of whether it is protected by the attorney-client privilege or whether it was gained during the attorney-client relationship or at some other time.<sup>69</sup> If secrecy is part of what attorneys are selling, the Rule increases both supply and demand.<sup>70</sup>

## 2. *The Prohibition and Exceptions*

The first subsection of Rule 1.6 provides both a prohibition against disclosure of client information and a commonsense exception for disclosures impliedly or expressly authorized.<sup>71</sup> The second subsection empowers, but does not require, the attorney to disclose information in two situations: (1) to prevent a serious crime,<sup>72</sup> and (2) to protect attorney interests.<sup>73</sup>

Rule 1.6(b)(1) empowers (but does not require) the attorney to disclose information to prevent the client from committing a crime that is likely to result in “imminent death or substantial bodily harm.”<sup>74</sup> In other words, disclosure is permissive.<sup>75</sup> The Rule declines to set any normative standard to indicate when an attorney *should* disclose client

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69. The Rule broadened the reach of the duty by eliminating *Code* language that limited the prohibition to disclosures that would be embarrassing or detrimental to the client. It is not necessary that the client declare information confidential to activate the duty. Further, there is no requirement that the information be embarrassing or detrimental for the duty to apply. See Gillers & Simon, Jr., *supra* note 48, at 65–66, 69–70.

70. In market terms, the scope provision increases the supply of secrecy by enlarging the universe of protected information and the prohibition against disclosure increases demand by reducing disincentives to seeking advice.

71. See *Model Rules of Professional Conduct* Rule 1.6 cmt. 7.

72. See *Model Rules of Professional Conduct* Rule 1.6. For the purpose of brevity, the term “serious crimes” is sometimes used to refer to the exceptions for “imminent death or substantial bodily harm” stated in Rule 1.6(b).

73. See Rule 1.6(b)(2).

74. Rule 1.6(b)(1).

75. In January 1980, the ABA solicited comments on the *Model Rules* by publishing a Discussion Draft of the *Model Rules*. See Michael W. Maupin, *Environmental Law, The Corporate Lawyer and the Model Rules of Professional Conduct*, 36 Bus. Law. 431, 431 (1981). The Discussion Draft Rule required attorneys to disclose information to prevent serious crimes: “A lawyer *shall* disclose information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm to another person . . .” See *id.* at 449 (emphasis added) (providing full text of Discussion Draft Rule, then numbered Rule 1.7). As adopted, the Rule is two steps removed from this draft. First, it rejects a mandate to attorneys to disclose information in the circumstances of the exceptions and, second, it rejects a normative standard as well.



information.<sup>76</sup> Instead, the power of an attorney to reveal information under this section attaches only when a two-pronged test is met. This test pairs an extreme consequence (imminent death or substantial bodily harm) with the most reprehensible conduct (commission of a crime).<sup>77</sup>

Context is needed to make the effect of this choice clear. If the terrorists who bombed the Federal Building in Oklahoma City had retained an attorney prior to the bombing and revealed their serious intent to carry out this plan, Rule 1.6 would impose no duty on the attorney to reveal their intentions. The Rule would *allow* such disclosure as a crime with serious consequence but there is no case in which it requires disclosure. The *Model Rules* prohibit any attorney conduct that would aid the commission of a crime.<sup>78</sup>

The standard of Rule 1.6(b)(1) is difficult to satisfy, especially when its uncertainty is taken into account.<sup>79</sup> Perhaps the client will not act at all, because of a change of heart, for example. Rule 1.6(b)(2) provides contrast. It states a liberal disclosure rule, allowing an attorney to reveal information about the client to protect the attorney's own interests.<sup>80</sup>

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76. As the Scope of the *Model Rules* notes, "Many of the Comments use the term 'should.'" See *Model Rules of Professional Conduct* Scope para. 13 (1994). By contrast, Rule 1.6 provides little guidance in identifying a situation that justifies disclosure.

77. Similarly, the proposed draft of *Restatement (Third) of Law Governing Lawyers* includes the requirement that the client conduct creating peril be a criminal act. See *Restatement (Third) of the Law Governing Lawyers* § 117A (Proposed Final Draft No. 1, 1996) (authorizing disclosure of confidential client information to prevent "death or serious bodily injury from occurring as the result of a crime that the client has committed or intends to commit").

78. See *Model Rules of Professional Conduct* Rule 3.3(a)(2) (1994). Additionally, if a statute requires disclosure of information relating to the plan, it provides an independent requirement under positive law.

[T]he disciplinary rules are only part of the law by which a lawyer is governed. A lawyer can be held liable under criminal law for aiding or abetting a crime, including the crime of fraud. A lawyer also can be held civilly liable on essentially the same terms. Strictly speaking, the basis of such liability is not violation of the rules of professional ethics, for those rules do not of themselves create criminal or civil liability.

Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the Kaye Scholer Case*, 26 Akron L. Rev. 395, 399 (1993).

79. See *infra* Parts III.B.2 and .B.3 for a discussion of the Penitent Client Clause and Safer Harbinger Provisions of Rule 1.6.

80. *Model Rules of Professional Conduct* Rule 1.6(b)(2) (1994). Rule 1.6 allows disclosure when an attorney reasonably believes a revelation is necessary to establish a claim or defense on his or her behalf. Rule 1.6(b)(2). Rule 1.6 also permits disclosure if either of the stated exceptions is met. Hence, a dispute involving an attorney brings her to the same point of analysis as a belief that the client intends to commit a crime likely to result in the imminent death or serious bodily harm of another. It seems unlikely, of course, that an attorney needs greater encouragement to protect her own interests.

The two exceptions set forth in Rule 1.6(b)(2) are introduced in the prohibitory provision of Rule 1.6(a) with language that suggests they are exclusive. The Rule declares that the lawyer "shall not reveal (client) information" except for implied authorizations and "as stated in paragraph (b)."<sup>81</sup> This language admits no other exception.<sup>82</sup>

In justifying the reach of the Rule and constrained exceptions, proponents of the ultimately adopted version of Rule 1.6 argued that the narrow rule was necessary to prevent the legal system from using lawyers as "policemen" of their clients<sup>83</sup> and to "encourage fuller and franker communication between a lawyer and client by narrowing the circumstances in which the lawyer could disclose client confidences."<sup>84</sup> Proponents also asserted that narrowing the scope of permissible disclosures would result in "more adequate legal advice."<sup>85</sup>

At first blush, the Rule appears to endorse a neutral balance. It declares that the attorney "may" reveal information when specified circumstances exist. Thus, it evokes the familiar paradigm of a general rule with exceptions and appears to invest the attorney with discretion to judge the exceptions. But the attorney's discretion is narrowly constrained. The attorney's judgment that a danger should be revealed is not sufficient to invoke the exception. He is forbidden to reveal client information except when one of the specific circumstances stated in the exceptions is present.<sup>86</sup> Additionally, the range of attorney choice is narrow and not truly discretionary. The lawyer is empowered to reveal

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81. *Model Rules of Professional Conduct* Rule 1.6(a).

82. See 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:101, at 128-29 (Supp. 1997) (noting "standard account" that "well informed lawyers—who might not be as well informed without the rule—can often prevent social harms by counseling clients and securing their compliance with law").

83. See *Legislative History*, *supra* note 13, at 48.

84. *Id.*; see *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). The same justification is given for relationships of confidentiality between other professionals and their clients. See, e.g., *In re Lifschutz*, 467 P.2d 557 (Cal. 1970) (holding that state constitution does not secure absolute privilege concerning all psychotherapeutic communications). In *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), the defendant-therapist argued that "free and open communication is essential to psychotherapy," and that without assurances of complete confidentiality, patients "'will be reluctant to make the full disclosure upon which diagnosis and treatment . . . depends.'" *Tarasoff*, 551 P.2d at 346 (quoting Sen. Comm. on Judiciary regarding Cal. Evid. Code § 1014); see also John G. Fleming & Bruce Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 Cal. L. Rev. 1025 (1974).

85. See *Legislative History*, *supra* note 13, at 48.

86. "The command of Rule 1.6(b)(1) as adopted is clear . . . lawyers who have mere knowledge of an impending client fraud, and who cannot plausibly be charged with participation or facilitation must suffer in silence." See 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:302, at 168.49 (Supp. 1996).

information only when she "reasonably believes" its revelation is necessary to prevent the intended serious crime.<sup>87</sup>

Study of the exception for harm to others suggests that the ABA may have given short shrift to the interests of third parties and the public in this balance. Although protection of the client and the attorney is clear from the language and structure of Rule 1.6, the actual range of protection achieved by the Rule for the public and third parties (individual units of the public) is nebulous and perhaps illusory.

## *B. The Momentum of the Rule*

### *1. The Preamble*

As legal rules provide a framework for action, they create their own momentum and force, indicating a preference for a particular outcome. Frequently, rules will both declare the expected outcome and indicate that a different result should inhere when circumstances are compellingly different from the general expectation. Thus, many legal doctrines can be analyzed in terms of general rules with accompanying exceptions. The "momentum" of a rule can be seen in myriad settings.<sup>88</sup> For example, in tort law punitive damages are not recoverable unless the defendant's conduct is found to be outrageous.<sup>89</sup>

In contrast to the norm of general rules and exceptions, the momentum of Rule 1.6 moves inexorably toward a categorical bar

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87. Use of the adverb "reasonably" to qualify the attorney's discretion suggests a second judgment, coming after the attorney's decision, perhaps by a judge or by a state's board of professional responsibility. On the other hand, some standard of judgment must be set. A reasonableness standard provides an objective test while a purely discretionary standard might unduly insulate the attorney's decision from the client's scrutiny.

88. Laws created to prevent discrimination based on race, color, religion, sex, or national origin are examples of the momentum of legal doctrine. See, e.g., 42 U.S.C. § 2000e-2 (1994). In constitutional law, heightened scrutiny provides protection by assigning special weight in the balance for interests deemed entitled to protected status. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). In commercial law, legal preferences are weaker. Thus, the effect or defaults of the applicable rules can be changed by contracting partners. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989); Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. Cal. Interdisciplinary L.J. 1 (1993).

89. See *Restatement (Second) of Torts* § 46 (1965) ("Outrageous Conduct Causing Severe Emotional Distress"); *Restatement (Second) of Torts* § 908 (1965) ("Punitive Damages"); see also *DiTeodoro v. J.G. Durand Int'l*, 566 F. Supp. 273 (E.D. Pa. 1983).

against disclosure.<sup>90</sup> the prohibition is broad; its exceptions are narrow and difficult to apply; and the policy expressed in the comments and other statements of the *Model Rules* emphasize the need to err on the side of silence.<sup>91</sup> The attorney's decision to refuse to disclose client information is not a violation of the Rule even in the dramatic circumstances of its exceptions.<sup>92</sup> Although Rule 1.6 recognizes the competing interests at issue, it does so without suggesting that the balance will ever justify, much less mandate, disclosure. Calling such a rule a balance of competing interests may be an overstatement.<sup>93</sup>

The Preamble statement that a lawyer "should keep" client information in confidence highlights the importance of confidentiality as a central obligation of attorneys. The statement provides moral suasion by use of the word "should." The Preamble also states its goal of balancing the interests of client, lawyer, and the public.<sup>94</sup> However, despite the goal of balancing these interests, the primary beneficiary of the Rule is the individual client. The Preamble's analysis accomplishes the balancing of the named interests once and for all, making a categorical conclusion that disclosure is never justified.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.<sup>95</sup>

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90. In his article *Conflict and Trust Between Attorney and Client*, Professor Robert Burt characterized the *Model Rules* as a mix of recognition of attorney-client conflict and a "misty wishing it away." Burt, *supra* note 55, at 1026.

91. See *infra* Part III.B.2 discussing the Penitent Client Comment.

92. See *Legislative History*, *supra* note 13, at 12.

93. See *Model Rules of Professional Conduct* Rule 1.6 cmts. 9, 14 (1994); *Legislative History*, *supra* note 13, at 53.

94. The Preamble states that "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person." *Model Rules of Professional Conduct* pmbl. para. 8 (1994). The Preamble also notes that conflicts "must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." *Model Rules* pmbl. para. 8; see *Legislative History*, *supra* note 13, at 12.

95. *Model Rules of Professional Conduct* pmbl. para. 7. The proposed preamble language in this section was changed. The proposed language stated that people are more likely to heed their legal

A line-by-line analysis of this statement illustrates the categorical nature of the Rule's stance against disclosure. The statement begins with a general discussion of the duties of representation; it minimizes the difficulty of balancing the competing interests involved, stating that the roles are "usually harmonious." This statement is unassailable on its own terms.<sup>96</sup> It assumes the ideal situation: a "well-represented" opposing party. Indeed, at some level, all attorneys must assume that competent representation is the norm.<sup>97</sup> Nonetheless, the absence of any reference to a situation other than this ideal of competent representation is noteworthy. The Preamble suggests no process for action or analysis in circumstances more difficult than the ideal. Rather, it presents the justification for the standard of confidentiality by linking it with the imponderable of zealous representation, focusing on the generality—the way things *should* (and in many cases *do*) work.<sup>98</sup> In fact, the need for the prohibition in the ordinary case is not subject to controversy.<sup>99</sup> Nevertheless, the exceptional case requires attention. Clarification of attorney duties in these exceptional cases can be crucial.

The Preamble's next statement deals specifically with confidentiality. It builds on the foundational statement of the ideal, justifying the rule of confidentiality on the basis that a lawyer "can be sure" that the rule "ordinarily serves the public interest."<sup>100</sup> This conclusion is stated with certainty: nondisclosure is justified because of the transcendent benefit to the "public interest." This categorical statement achieves the task of balancing without acknowledging any counterweight to its principle. The message is that whatever harm is feared in the particular case, it

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obligations "when they know they can do so in private." *Legislative History*, *supra* note 13, at 9–10.

96. The profession's view of itself has been assailed often, however, based on the social utility of the profession. "While this professed harmony between personal and professional ethics carries with it a comforting security and deceptive public appeal, it, nevertheless, strikes a discordant note with some who have given the ethical codes a closer look." Lorentz, *supra* note 4, at 2.

97. Moreover, measures for leveling the playing field are too unclear, allowing adjustment in the interest of equality.

98. This statement provides the focus of the discussion, justifying nondisclosure with a generality. At this point, the reader cannot condemn the summary. It is, after all, only a summary possibly leaving the harder cases for the particulars in the rules themselves. A full reading of the Rule and comments, however, reveals no fuller treatment of problem cases. The existence of viable exceptions in the Rule would make this general declaration less troubling.

99. "In routine cases, attorney-client confidentiality is uncontroversial. It protects clients and benefits society by enabling the legal system to work." Zacharias, *supra* note 1, at 356. "In practice it is probably true that most future acts of client wrongdoing are prevented by effective client counseling." Wolfram, *supra* note 32, § 12.6.3, at 667.

100. *Model Rules of Professional Conduct* pmbl. para. 7.

cannot outweigh the public interest served by silence: people seek advice and heed it because of the rule of confidentiality.<sup>101</sup>

The commentary to Rule 1.6 continues the justification of social utility. Comment 3 notes the general operation of the Rule. "Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. . . . Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."<sup>102</sup> The comment justifies the rule in the individual case based on the generalization that "almost all clients follow the advice given, and the law is upheld."<sup>103</sup> It freezes the scene at the point of lawyer counseling, ignoring the situation in which the lawyer is unsuccessful in urging a change of heart by the client.

Comment 9 notes the utilitarian basis for silence found in the fear that a rule more lenient toward disclosures would chill communications between lawyer and client and result in loss of the opportunity to influence client conduct for the good.

In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.<sup>104</sup>

This comment acknowledges the possibility of a client intent on inflicting "serious harm" to others but gives no indication that disclosure is ever an appropriate response to the problem.<sup>105</sup> The comment assumes that without a strong rule of confidentiality people will not seek a lawyer's advice.<sup>106</sup> The converse is that a strong prohibition against

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101. "Over the long run client-lawyer conversations will actually decrease the total number of crimes and frauds, because clients in genuine doubt about a course of conduct will be dissuaded from illegal action by their questionable schemes hoping to be talked out of them." 2 Hazard, Jr. & Hodes, *supra* note 34, app. 3, at 1236.

102. *Model Rules of Professional Conduct* Rule 1.6 cmt. 3 (1994).

103. Rule 1.6 cmt. 3.

104. Rule 1.6 cmt. 9.

105. A draft of the *Model Rules* discarded before presentation to the ABA House of Delegates provided for mandatory disclosure in the case of serious crimes. See 2 Hazard, Jr. & Hodes, *supra* note 34, § AP4:104, at 1262.

106. The same concept justifies confidentiality in other professions as well. See *Jaffee v. Redmond*, 116 S. Ct. 1923, 1929 (1996) (recognizing psychotherapist privilege under Rule 501

disclosure will increase the likelihood that people will seek legal advice.<sup>107</sup> Even assuming that more people *seek* legal advice under a strong rule of confidentiality, however, the notion that more people will "heed" their legal obligations is open to question.<sup>108</sup>

The linchpin of the Rule's justification of the social utility<sup>109</sup> of nondisclosure is that clients will heed the counsel of attorneys urging them to comply with the law.<sup>110</sup> It stands to reason that a rule encouraging disclosure may have a chilling effect on client communications as compared with a rule encouraging no disclosure.<sup>111</sup> Under an economic view, however, the client will take into account the attorney's power to reveal the client's confidences or to take action to protect others from client conduct. The greater the client's certainty that the attorney has no power beyond admonishing compliance, the less likely the client will heed the attorney's advice.<sup>112</sup> Some clients will be dissuaded from harmful conduct by learning that it is unlawful, but others may use the attorney's counsel, not to comply with the law but to exploit advantages.<sup>113</sup> Assuming an attorney has an opportunistic

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based on need for confidentiality in mental health area). Nevertheless, context is relevant. In *Jaffee* the privilege recognized did not relate to disclosures to prevent future harm. "Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." *Id.*

107. This assumption, like other assumptions with significant impact on legal rules, should be studied empirically. "In attempting to assess the impact of confidentiality on clients, it is . . . important for future empirical research to seek the information from laypersons and clients themselves." Zacharias, *supra* note 1, at 397.

108. "To accept the modern systemic arguments in favor of confidentiality, one must reach one of two conclusions: first, that clients would use lawyers significantly less if more exceptions existed; second, that clients who employ lawyers would reveal substantially less information. Both conclusions are questionable." *Id.* at 363–64.

109. The *Model Rules* note that the legal profession "has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." *Model Rules of Professional Conduct* pmbl. para. 11 (1994).

110. As is noted earlier, another reason for the Rule that serves a social purpose is the need for full representation of individuals. See *supra* notes 31–35 and accompanying text. This purpose bears less directly on the issue of disclosure of a serious intended crime than the argument that the duty to disclose would chill discussions of crime and reduce the attorney's influence to persuade the client to abandon his injurious plan. See Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. Pa. L. Rev. 1939 (1988).

111. In some circumstances a chilling effect is not a bad thing. See 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:110, at 168.5 (Supp. 1996) (noting that "if clients bent on fraud are 'chilled,' so much the better").

112. Ironically, when confidentiality is certain, the likelihood that the rule will have the full effect intended may be diminished.

113. "Knowledge of the law thus is two-edged. When the lawyer is in a situation in which the client may well use the relevant knowledge of the law to violate the law or avoid its norms, what

client,<sup>114</sup> Rule 1.6 may reduce the effectiveness of attorney counseling because the client knows the attorney is powerless to counteract his wrongful conduct. Rule 1.6 prohibits the attorney from speaking to rectify the effects of client conduct furthered by the representation. Although other rules of the *Model Rules* seek to check opportunistic or wrongful conduct by clients, they do not expressly allow disclosure.<sup>115</sup> Though an attorney may have knowledge of a future crime or fraud or past benefit achieved through her representation, she has no right to reveal this knowledge unless the strictures of Rule 1.6 are satisfied.

## 2. *The Penitent Client Comment*

Comment 13 of Rule 1.6 deals with the exception for disclosure of intended crimes. It acknowledges attorney discretion within carefully hedged categories but continues to counsel nondisclosure as the preferred choice.

The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to “know” when such a heinous purpose will actually be carried out, for the client may have a change of mind.<sup>116</sup>

An attorney consulting Rule 1.6 and its comments for guidance on whether to disclose client information is reminded by this comment 13 that the client may not carry out his declared intention.<sup>117</sup> Thus, the

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ought the lawyer to do?” Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 Yale L.J. 1545, 1547 (1995); see also Lon Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958); Lawry, *supra* note 55, at 321.

114. Unfortunately, the assumption of an opportunistic client does not require a suspension of disbelief or a departure from experience. See, e.g., *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134 (6th Cir. 1983) (setting aside compromise agreement with higher price based on finding that sellers engaged in coercion by threatening not to sell in future to buyer); *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971) (finding that seller’s threat to withhold delivery constituted economic duress when buyer faced genuine possibility of substantial liquidated damages and other vendors were unable to commence delivery of item soon enough); see also 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:101, at 130.1 (Supp. 1997) (noting that exceptions to Rule 1.6 are necessary “lest unworthy clients take advantage of the rules”).

115. See *Model Rules of Professional Conduct* Rules 1.2, 1.16, 3.3 (1994). See also *infra* notes 139, 214 to 217 and accompanying text for a discussion of these rules.

116. *Model Rules of Professional Conduct* Rule 1.6 cmt. 13 (1994).

117. In the context of the therapist’s duty to warn others of danger created by a patient, the California Supreme Court considered the uncertain nature of threats or statements of intent to harm others.



attorney is encouraged to doubt even a straightforward statement of intent by a client.<sup>118</sup>

This may be one point in the analysis that is easier in environmental cases. If the crime is an ongoing violation such as a contamination of property with hazardous wastes, a crime has already been committed. Under many environmental statutes, the continued existence of the contamination is classified as a new crime each day.<sup>119</sup> The status quo is both a past crime (which is certain) and a future crime (which is likely). Thus, the client's refusal to comply with the law by reporting the condition constitutes a future "criminal act that the lawyer reasonably believes is likely to result in imminent death or substantial bodily harm."<sup>120</sup> This situation is not subject to the statement that it is "very difficult to know" whether the "heinous purpose will actually be carried out." A change of heart in this setting would be a determination by the client to begin the correction or remediation process. It is likely that the crime will occur again (tomorrow).<sup>121</sup> Because the possibility of a penitent client is only one rationale for the broad rule against nondisclosure, the implications of this difference in the environmental context are unclear. Even when the criminal conduct element of the exception is met, the attorney must speculate about the seriousness of the harm that may flow from the crime.

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Weighing the uncertain and conjectural character of the alleged damage done the patient by such a warning against the peril to the victim's life, we conclude that professional inaccuracy in predicting violence cannot negate the therapist's duty to protect the threatened victim.

*Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 346 (Cal. 1976).

118. This statement may be simply an explanation of the reason for abandoning a "knowledge" standard, meaning that the attorney may disclose when he meets the less stringent standard of reasonable belief. Such an explication seems unnecessary, however, because the history of the Rule does not suggest that a knowledge standard was proposed. See *Legislative History*, *supra* note 13, at 47-51.

119. See, e.g., 33 U.S.C. § 1319(c)(1)(B) (1994) (providing penalty of between \$2500 and \$25,000 per day and imprisonment of up to one year for negligently introducing hazardous substances into sewer system or publicly owned treatment works); 33 U.S.C. § 1319(c)(2) (1994) (providing penalty of between \$5000 and \$50,000 per day for knowing violations of Act); 42 U.S.C. § 6928(d)(1) (1994); see also Roger M. Klein, *The Continuing Nature of Notification Violations Under Environmental Statutes*, 26 *Env'tl. L.* 565 (1996).

120. *Model Rules of Professional Conduct* Rule 1.6.

121. Uncertainty remains even in such cases of continuing crimes, however. "Do the Model Rules give you the option to reveal that information [of a continuing crime] to the public, or to appropriate authorities? If revealing your knowledge of your client's intention to commit a future crime would likely have the effect of divulging a past crime, is disclosure permissible?" George W. Van Cleve, *Environmental Law in the 1990's and Its Principal Implications for Professional Responsibility*, C534 A.L.I.-A.B.A. 407, at 417 (June 25, 1990), available in WESTLAW, A.L.I.-A.B.A. CLE Materials File.

### 3. *The "Safer" Harbor Comment*

Next the official comment offers the attorney a safer harbor in a difficult situation: "A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule."<sup>122</sup> The "preventive action" referred to is disclosure of client information. Read literally, this comment states that no matter how extreme the danger or harm intended by a client, the attorney's decision to remain silent about the client's intent is not a violation of the Rule.<sup>123</sup> Even if the client seriously threatens an imminent murder, the Rule offers no encouragement to warn the third party.<sup>124</sup>

The import of this statement is not lost on the practicing attorney. Attorneys are trained to evaluate the relative risks and benefits of various courses of conduct. In a majority of transactions the attorney focuses on the primary goal of avoiding violations. Both common sense and legal training identify the preferred option as one carrying the lowest risk: nondisclosure.

The power of this safer harbor comment can be illustrated by examining the benefits and risks of two options: choice *A* (nondisclosure) and choice *B* (disclosure). If choice *A* is never a violation of the Rule but choice *B* may be a violation, choice *A* is preferred as the less risky choice. Additionally, if choice *B* can be deemed an acceptable alternative (nonviolative of the Rule) only after a series of difficult judgment calls, as in the case of Rule 1.6, the likelihood that the attorney will choose choice *B* (revealing client information) is further reduced. Finally, when some of those difficult judgments calls cannot be verified, the risk of choice *B* is heightened still further. For example, under Rule 1.6, when the attorney discloses client information (choice *B*) in time to prevent the client from committing a crime, the question of whether or not the crime would ever have been consummated will always remain unanswered. Likewise, whether the uncommitted crime would have resulted in death or substantial bodily harm is unknowable. Assuming the client would have acted, the victim might have eluded harm through his own efforts or favorable circumstances. Thus, choice *A* is a safer harbor by far than

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122. *Model Rules of Professional Conduct* 1.6 cmt. 14.

123. The comment does not advert to the fact that the decision may violate other provisions of the *Model Rules* or positive law.

124. Of course, the attorney may have a duty under positive law (statutory or common law) to report such intentions by anyone.

choice *B*. Of course, this view of risks to the attorney fails to take into account disclosure obligations created by positive law.<sup>125</sup>

The Scope section of the *Model Rules* underscores the conclusion that the safer route is nondisclosure. This statement cautions against re-examination of the lawyer's discretion in one instance (choice *A*): "The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination."<sup>126</sup> Like the commentary of Rule 1.6 and the Preamble, this statement relies on the policy justification of the general good. "Permitting such re-examination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure."<sup>127</sup>

Hence, the Rule and commentary present a strong case for nondisclosure. First, the Rule defines narrow situations in which an attorney has discretion to reveal information. Next, the comment encourages the attorney (in the exercise of this discretion) to doubt that a client will carry out his communicated intent to commit a crime. Finally, it assures the attorney that she will not be in violation of the Rule if she remains silent. When an attorney consults Rule 1.6 to seek guidance regarding whether to disclose client information, he will find no case in which disclosure is mandated or encouraged. Rather than identifying a balance to be applied to particular circumstances, the Rule makes the assessment and categorically concludes that nondisclosure is always the best choice.<sup>128</sup>

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125. The Rule engenders this myopia by its deletion of any mention of the duty to disclose information in response to positive law. For a discussion on the deletion of positive law as a basis for disclosure, see *infra* notes 152 to 164 and accompanying text.

126. See *Model Rules of Professional Conduct* Scope para. 20 (1994). Professor Simon has noted that the *Model Rules* "contemplate decisions exempt from review and discipline." See William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1088 (1988) (suggesting that *Model Rules* might create private norms).

127. *Model Rules of Professional Conduct* Scope para. 20.

128. This treatment of conflict and resolution is similar to the short story *The Senior Partner's Ethics*. See Louis Auchincloss, *The Senior Partner's Ethics*, in *Skinny Island: More Tales Of Manhattan* 194 (1987). In the story, a young associate, Brendan Bross, seeks the counsel of Laurison Phelps, the managing partner of a respected firm. Bross communicates his certain knowledge that a partner in the firm has falsely denied the existence of a document sought in discovery. Under the guise of analyzing the options open to Bross, Phelps, the "senior partner" of the title, uses his advocacy skills to try to dissuade the young attorney from disclosing the document. *Id.* at 208-11, cited in Lawry, *supra* note 55, at 349-51. Like the senior partner, Rule 1.6 employs analysis of competing interests to advocate silence.

C. *The Evolution of the Rule—Changes from the Proposed Rule*

The Proposed Rules drafted by the Kutak Commission generated great controversy, primarily because the broader exceptions to the prohibition against disclosure of client information were regarded as a “radical attack on the adversary system.”<sup>129</sup> A review of these changes charts the movement away from any concern for the interests of third parties and toward an absolute rule of nondisclosure.<sup>130</sup> “The ABA House of Delegates retained the basic structure of Rule 1.6 but rejected most of the exceptions to confidentiality that had been proposed.”<sup>131</sup> The dramatic changes made to Proposed Rule 1.6 during debate by the ABA House of Delegates rendered the Rule “so nearly absolute as to be unworkable in practice.”<sup>132</sup> Proposed Rule 1.6, drafted by the Kutak Commission, provided as follows:

- (a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure.
- (b) A lawyer may reveal such information to the extent the lawyer believes necessary:
  - (1) To serve the client’s interests, unless it is information the client has specifically requested not be disclosed;
  - (2) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;
  - (3) To rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used;

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129. W. William Hodes, *The Code of Professional Responsibility, The Kutak Rules, and the Trial Lawyer’s Code: Surprisingly, Three Peas in a Pod*, 35 U. Miami L. Rev. 739, 741 (1981). As Hodes explains, “Critics saw the Discussion Draft [of the *Model Rules*] as radical primarily, and often exclusively, because of its provisions regulating the preservation of client confidences and the situations in which the lawyer may or must disclose them.” *Id.* at 745.

130. Changes such as the broadening of the class of protected data from “confidences and secrets” to “information,” and the narrowing of the categories within the attorney’s discretion add to the momentum of the Rule noted above.

131. 2 Hazard, Jr. & Hodes, *supra* note 34, § AP4:103, at 1260.

132. *Id.*

(4) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or

(5) To comply with the rules of professional conduct or other law.<sup>133</sup>

The following changes were made during the process of debate on Proposed Rule 1.6: (1) deletion of the exception for fraudulent client acts; (2) deletion of the duty to rectify client fraud furthered by the attorney; (3) deletion of the protection of property interests and financial interests of non-clients; (4) deletion of the reference to disclosures permitted "to comply with other law"; and (5) addition of the term "imminent" to qualify "death."<sup>134</sup> Each of these changes constrains the attorney's ability to reveal client information. They are discussed below as they relate to the issue of confidentiality in the context of potential environmental hazards.

### 1. *Deletion of the Fraud Exception*

As adopted, Rule 1.6 provides no basis for disclosure of fraudulent acts, even when such fraud will result in significant injury.<sup>135</sup> This result unjustifiably elevates the interests of the client over those of third parties without assessing the weight of each interest. "[A] client is entitled to complete confidentiality with respect to proper legal representation, but has no justified expectation of confidentiality when he uses the attorney to perpetrate a fraud on another person."<sup>136</sup>

The categories of fraud and crime intersect in some cases. Nevertheless, that a fraud may result in serious injury does not

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133. *Model Rules of Professional Conduct* Rule 1.6 (Proposed Final Draft 1981), reprinted in Hodes, *supra* note 129, at 807 n.242.

134. For a more thorough assessment of the changes made during the debate on the *Model Rules*, see Hodes, *supra* note 129.

135. See Caudill, *supra* note 4, at 370-71. Caudill asserts:

[I]f an attorney faces ethical sanctions or liability to third parties for failure to report client fraud, should we join the current trends of legal scholarship and of the courts in condemning him or her, or should we view that individual as caught within a confusing web of inconsistent guidelines and conflicting duties, of dangerous line-drawing and expensive moral introspection?

*Id.*

136. Aronson, *supra* note 55, at 832.

automatically render that fraud a crime.<sup>137</sup> The conduct constitutes a crime only if the legislature has defined it as such. Assuming that the conduct is a crime, the attorney must search for and interpret the applicable statute—a time-consuming job in urgent circumstances.<sup>138</sup> Although other provisions of the *Model Rules* deal with the issue of client fraud,<sup>139</sup> none authorizes disclosure.

An example of a dangerous fraud in the area of environmental law is the seller's fraudulent statement that property sold to a third party has a clean "bill of health" when, in fact, the property is contaminated with hazardous wastes. Some states require sellers to disclose the environmental contamination existing on property offered for sale.<sup>140</sup> Additionally, damages may be recovered from the vendor<sup>141</sup> and perhaps

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137. Some attorneys assume that any fraud that creates serious danger will also be prohibited by a criminal statute. To justify the deletion by this argument proves too much, however. If the intent of the Rule is to capture dangerous frauds as crimes, there seems to be no reason to subsume the category.

138. "Unfortunately, the current state of the law provides very little guidance to the attorney who is confronted with client fraud." Committee on Prof'l Responsibility, Association of the Bar of the City of N.Y., *Report on the Debate Over Whether There Should Be an Exception to Confidentiality for Rectifying a Crime or Fraud*, 20 Fordham Urb. L.J. 857, 862-63 (1993) (focusing on issue of past frauds but assessing current state of law generally).

139. Under Rule 1.2, an attorney may not assist a client in a fraud. *Model Rules of Professional Conduct* Rule 1.2 (1994). Comment 11 of Rule 1.6 presents a carefully drawn line relating to disclosure of client fraud, rejecting any duty to rectify fraud of a client. It states: "[T]he lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to 'counsel or assist' criminal or fraudulent conduct requires knowing that the conduct is of that character." *Model Rules of Professional Conduct* Rule 1.6 cmt. 11 (1994). In other words, the attorney may not assist in fraudulent or criminal conduct but he must not disclose the conduct, even if he has assisted in it unknowingly, except in the exception stated in Rule 1.6(b) to prevent a serious crime. This fine line has been criticized. See, e.g., Lester Brickman, *Keeping Quiet in the Face of Fraud*, L.A. Times (Metro), Mar. 12, 1992, at B7. Additionally, Rule 3.3 prohibits an attorney from using false evidence but denies the attorney the right to disclose information to prevent a client from committing a fraudulent act even when the attorney reasonably believes that the fraud is likely to result in imminent death or substantial bodily harm. See *Model Rules of Professional Conduct* Rule 1.6 (1994).

140. See, e.g., Cal. Health & Safety Code § 25359.7 (West 1992 & Supp. 1997); Mo. Ann. Stat. § 260.465 (Vernon 1990); N.J. Stat. Ann. § 13:1K-6 (West 1991 & Supp. 1996); 35 Pa. Cons. Stat. Ann. § 6018.405 (West 1990); *Alexander v. McKnight*, 9 Cal. Rptr. 2d 453, 456 (Ct. App. 1992) (relying on Cal. Code § 1102.6 to find that failure to disclose negative fact when it can reasonably be said to have foreseeable depressing effect on property value is tortious); *O'Leary v. Industrial Park Corp.*, 542 A.2d 333, 336 (Conn. App. Ct. 1988) (holding that failure to disclose facts and existence of request or circumstance that imposes duty to speak forms essence of fraudulent misrepresentation); *Strawn v. Canuso*, 638 A.2d 141, 150 (N.J. Super. Ct. App. 1994) (following *Restatement (Second) of Torts* § 551 to hold that seller and broker had duty to disclose existence of landfill), *aff'd*, 657 A.2d 420 (N.J. 1995).

141. See *Lingsch v. Savage*, 29 Cal. Rptr. 201 (Ct. App. 1963) (noting that seller liable for failure to disclose known material defects in property); *Strawn*, 657 A.2d at 429 (stating that seller

against the vendor's attorney<sup>142</sup> if the contamination harms the purchaser. Nevertheless, Model Rule 1.6 forbids the lawyer to disclose the dangerous condition of the property unless the jurisdiction has defined the client's conduct as a crime. In other words, the Rule refuses to allow an attorney to act to protect third parties even though a court may find him liable for the injury to those third parties.

Assessing the elements of a crime presents additional analytical problems. Issues of intent present in criminal matters are not implicated when the culpable conduct is merely fraud. Thus, the Rule makes the attorney's decision to disclose client intentions riskier by requiring him to decide an issue that cannot be determined with certainty prior to a trial.

## 2. *Deletion of the Duty To Rectify*

The adopted version of Rule 1.6 provides no basis for disclosures to rectify fraud or criminal acts. Because the attorney is at risk of being blamed for the client's misdeeds, the exception to rectify crimes or frauds arguably should be read back into the Rule.<sup>143</sup> The exception "must exist in the responsible practice of law."<sup>144</sup> The right to withdraw from representation provides some protection against fraud.<sup>145</sup> In some

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liable for failing to disclose that residences sold were within one-half mile of toxic waste dump). Section 353 of the *Restatement (Second) of Torts* provides that a seller who fails to disclose a dangerous conditions known to him is liable for physical harm to persons on the land if the buyer did not know and had no reason to know of the condition of the property. See *Restatement (Second) of Torts* § 353 (1965); see also *Leaking Underground Storage Tanks: Maine High Court Says Seller of Property Had Absolute Duty to Disclose Leaky Tank*, 11 *Toxics L. Repr.* (BNA) 838 (Jan. 8, 1997). See generally Sarah L. Inderbitzin, *Taking the Burden off the Buyer: A Survey of Hazardous Waste Disclosure Statutes*, 1 *Env'tl. L.* 513, 558 (1995) (arguing that buyer should have option of voiding transfer of property contaminated with hazardous wastes when seller failed to disclose contamination); Ann J. Rosenthal & R. Stuart Phillips, *Tell It Like It Is—Sellers' Duties of Disclosure in Real Estate Transactions under California Law*, 26 *Golden Gate U. L. Rev.* 473 (1996).

142. Professionals who fail to warn third parties of dangerous activities intended by their clients may be subject to tort liability. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976); *Easton v. Strassburger*, 199 Cal. Rptr. 383 (Ct. App. 1984) (holding that real estate broker has duty to conduct inspection of residential property offered for sale and to disclose facts that materially affect value of land to prospective purchasers).

143. See 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:202, at 168.4 (Supp. 1996) (stating that this exception and exception to comply with law are "so necessary that they will almost certainly be read back into Rule 1.6, one way or another, by courts, disciplinary authorities, and practicing lawyers").

144. *Id.*

145. Comment 14 to Rule 1.6 notes that a lawyer must withdraw in some circumstances: "If the lawyer's services will be used by the client in materially furthering a course of criminal or

circumstances the lawyer may also "disaffirm any opinion, document, affirmation, or the like."<sup>146</sup> Nevertheless, Rule 1.6 prohibits the attorney from revealing the continuing threat.

To carry forward the above hypothetical, the lawyer may learn that the purchaser (and his family) are at continuing risk because of a completed transfer of contaminated land. Far from being a "panacea," the right of withdrawal makes little difference in many circumstances.<sup>147</sup> In the context of environmental hazards, it does little to protect the public from environmental risks.<sup>148</sup> An attorney who withdraws from representation because of unreported environmental dangers or a threatened environmental violation has no leverage. Unless the client is involved in a related lawsuit at the time of the withdrawal, it is likely that no one except the client will know about the withdrawal.<sup>149</sup>

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fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1)." *Model Rules of Professional Conduct* Rule 1.6 cmt. 14 (1994). Additionally, when the mandate to withdraw does not apply, Rule 1.16(b) gives attorneys wide latitude to choose to withdraw from representation. For example, under Rule 1.16(b)(2) a lawyer may either withdraw for "good cause" if the client has used the "lawyer's services in the past to perpetuate a crime or fraud," or may withdraw when the withdrawal "can be accomplished without material adverse effect" on the client's interests. See *Model Rules of Professional Conduct* Rule 1.16(b) (1994). This circumstance is a catch-all, allowing the attorney to withdraw without any additional basis if the withdrawal will not be a materially adverse burden on the client. Rule 1.16(b). The Rule includes situations in which the client has failed to pay or in which the fee (though paid) fails to compensate the attorney adequately. In other words, the attorney's ability to withdraw is unfettered if the withdrawal does not significantly harm the client. Rule 1.16(b).

146. Comment 15 presents the right of "noisy withdrawal." It allows the attorney to give notice of withdrawal in some circumstances. See *Model Rules of Professional Conduct* Rule 1.6 cmt. 15; ABA Comm. on Ethics and Professional Responsibility, Formal Op. 366 (1992) (deciding that attorney may disaffirm work product when client intends to use work to continue fraudulent conduct); see also Wolfram, *supra* note 32, § 9.5.3, at 548; Ernest F. Lidge III, *Client Perjury in Tennessee: A Misguided Ethics Opinion, an Amended Rule, and a Call for Further Action by the Tennessee Supreme Court*, 63 Tenn. L. Rev. 1 (1995).

147. "The Ethics Report notes that the 'noisy withdrawal' provision is not a panacea for the present limitations of black letter Model Rule 1.6(b)." Comm. on Prof'l Responsibility, Association of the Bar of the City of N.Y., *supra* note 138, at 860.

148. This is not to say that work product disaffirmance lacks significant effects in other contexts. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 376 (1993) ("The Lawyer's Obligation Where a Client Lies in Response to Discovery Requests"); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 366 (1992) ("Withdrawal When a Lawyer's Services Will Otherwise Be Used to Perpetrate a Fraud").

149. Some argue that . . . "noisy" withdrawal is tantamount to the lawyer's rectification of the fraud. Disaffirmance of work product, however, is not full disclosure in any sense. Most importantly, the lawyer may not reveal the information that caused him or her to withdraw; nor may the lawyer explain that the withdrawal is due to client fraud, since that would violate the lawyer's duty of confidentiality imposed by Rule 1.6. The argument that a noisy withdrawal is sufficient can be taken both ways: if "noisy" withdrawal constitutes inferential disclosure of client fraud, why should the attorney be prohibited from making full and explicit disclosure? On the other hand, if "noisy"



### 3. *Financial and Property Interests of Third Parties*

According to the Reporter of the *Model Rules*, Professor Geoffrey C. Hazard, Jr., the proposed exception to protect the financial and property interests of third parties "created a firestorm of protest."<sup>150</sup> Nevertheless, this exception would not necessarily result in more disclosures by attorneys. Rather, in many cases, it would result in a client changing the course of his conduct or never formulating the harmful plan because of the counsel he received from an attorney. In the environmental arena, financial loss is likely to be dramatic. No matter how disabling a financial loss might be, Rule 1.6 provides no protection for the financial interest of third parties. This fact is more troubling when one considers the protection for financial interests accorded attorneys.<sup>151</sup>

### 4. *Deletion of Disclosures To "Comply with Other Law"*

The House of Delegates deleted the proposed exception to comply with other law after debate during the February 1983 mid-year meeting.<sup>152</sup> As a practical matter, deletion of this provision may have little or no effect on attorney obligations.<sup>153</sup> The Preamble to the *Model Rules* acknowledges the power of positive law.<sup>154</sup> Additionally, comment 20 to the Rule notes that the *Model Rules* and "other law," may require disclosure of client information in some circumstances.<sup>155</sup> Of even

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withdrawal is something significantly less than rectification of client fraud, then it cannot be considered an adequate remedy for harms suffered by third parties.

Comm. on Prof'l Responsibility, Association of the Bar of the City of N.Y., *supra* note 138, at 865.

150. See 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:109, at 168.3 (Supp. 1996).

151. See *Model Rules of Professional Conduct* Rule 1.6(b)(2). Although third party interests are without positive protection under the Rule no matter how great the harm, financial interests of attorneys are protected by the attorney self-defense exception—no matter how small. The determinative factor of the attorney self-defense exception is the identity of the party (an attorney) rather than the gravity of the harm sought to be avoided. Additionally, this protection for the attorney is in sharp contrast to the ABA's caution against self-interest in the Preamble to the *Model Rules* and raises serious questions regarding the ability of the profession to regulate itself.

152. See *Legislative History*, *supra* note 13, at 48.

153. Without reading in an exception to comply with law, Rule 1.6 fails to "survive even linguistic analysis." See 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:112, at 163.7 (Supp. 1996).

154. "A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law." *Model Rules of Professional Conduct* pmbi. para. 3 (1994).

155. *Model Rules of Professional Conduct* Rule 1.6 cmt. 20 ("[A] lawyer may be obligated or permitted by other provisions of law to give information about a client."); see 2 Hazard, Jr. & Hodes, *supra* note 34, § AP4:104, at 1260-61 (Supp. 1994) (predicting that exception for disclosures "required by law" must be added).

greater weight, of course, is that legislatures have the power to regulate the conduct of all persons within their jurisdiction, including attorneys.<sup>156</sup> Thus, positive law, enacted by a legislature trumps self-regulation by attorneys<sup>157</sup> so long as the legislation stops short of violating the separation of powers.<sup>158</sup> Moreover, attorneys cannot escape the reach of the common law by virtue of rules of ethics.<sup>159</sup>

Nevertheless, deletion of a reference to positive law is troubling. As adopted, Rule 1.6 provides no hook for analyzing a contest between positive law and the Rule. Practicing attorneys, experienced and inexperienced alike, are well aware of the strong prohibition against disclosure of client information. Thus, a difficult issue arises when positive law appears to require disclosure—especially when the duty arises from the common law.<sup>160</sup> Deletion of the Rule's reference to other law minimizes the significance of positive law and reduces the likelihood that an attorney will fully analyze the contest between the duty of confidentiality and her obligations under statutory law or the common law.<sup>161</sup> This puts attorneys in a "difficult position"<sup>162</sup> and may create confusion and danger for third parties. The effect is intensified by the Scope section of the *Model Rules*, which declares: "The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination."<sup>163</sup> Certainly most attorneys would

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156. See Hodes, *supra* note 129, at 758–60. "[F]ederal and state courts often state that the only instances in which they are bound to treat the ethics rules as binding precepts are in disciplinary proceedings against lawyers." Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389, 1412 (1992).

157. See Koniak, *supra* note 156, at 1411–12.

158. "[I]t is safe to say little more than that a state could not constitutionally *abolish* the rule of confidentiality or the attorney-client privilege in criminal cases." See 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:103, at 134.

159. See *Legislative History*, *supra* note 13, at 13 (noting that self-regulation must be adequate to avoid government regulation). "[T]he operation of law external to the law of lawyering—other law—will sometimes 'force' further exceptions, regardless of what a disciplinary code might say." 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:109, at 168.1–168.2 (Supp. 1996).

160. See 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:113, at 168.9 (Supp. 1996) (noting that attorney "may take the view that he is required by 'law,' namely tort law or criminal law, to disclose preemptively client misdeeds in which the lawyer's services were used").

161. See Koniak, *supra* note 156, at 1413–15 (noting that *Model Rules* "contain no explicit statement on the general hierarchy of norms" and even suggest "that the Rules provide the megatext for resolving conflicts with other law and thus constitute higher authority").

162. *ABA/BNA Lawyers' Manual on Professional Conduct* 55:1201 (1994) (stating that Rule 1.6 puts attorneys in "a much more difficult position" than was case under *Model Code*).

163. *Model Rules of Professional Conduct* Scope para. 20 (1994); *Legislative History*, *supra* note 13, at 23. This comment is oddly reminiscent of the authority issues raised in Glendower's boast to Hotspur, "I can call spirits from the vasty deep," and Hotspur's response, "Why, so can I;

comply with a court order rather than face contempt of court. At any rate, deletion of the acknowledgment of positive law and inclusion of the above statement seeking to insulate attorney decisions from review are strong evidence of the categorical nature of the prohibition against disclosure.<sup>164</sup>

### 5. *Addition of "Imminent" To Qualify "Death"*

The ABA House of Delegates amended the final rule, as a result of debate at the 1983 mid-year meeting, by adding the word "imminent" to modify "death."<sup>165</sup> The legislative history shows that Professor Hazard, Reporter for the *Model Rules*, expressed the view that the addition of this modifier was unnecessary because the proposed standard took into account the "realness and directness of the harm."<sup>166</sup> That the qualifier "imminent" is redundant does not mean, however, that its inclusion has no effect. The set of reportable client information is narrowed by the inclusion of the word "imminent." Inclusion of the modifier adds another judgment call to an already difficult analysis, making the attorney's choice to report less likely. The set of crimes resulting in "imminent death" defines a smaller universe than those resulting in "death," and mere threatened death does not justify reporting a crime under the Rule.<sup>167</sup> Addition of the modifier renders a reasonable belief that the client will kill another an insufficient predicate for disclosing client information. Read literally, the final rule requires the attorney to

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or so can any man; But will they come, when you do call for them?" William Shakespeare, *The First Part of Henry IV*, act 3, sc. 1, ll. 53-55 (David Bevington ed., Oxford Univ. Press 1987) (1598).

164. See Koniak, *supra* note 156 (arguing that nomos of legal profession and that of state are at odds and state lacks commitment necessary to govern legal profession).

165. See *Legislative History*, *supra* note 13, at 48-49.

166. See *id.* at 49.

167. A qualifier limits the set of the noun it modifies. For example, the set "apples" is limited by the qualifiers "red" or "yellow" or "poison." This rule of construction is true for all but the non-exclusive adjectives such as "all" or "any." By traditional principles of interpretation a term should be presumed to add to the effect of the rule; an interpretation that renders a term surplus is disfavored. See, e.g., *Kenerson v. FDIC*, 44 F.3d 19, 23 (1st Cir. 1995); *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 975 (4th Cir. 1993) (noting that court "assume[s] that the legislature used words that meant what it intended; that all words had a purpose and were meant to be read consistently"); *In re Village Bank & Trust Co.*, 471 A.2d 1187, 1188-89 (N.H. 1984). Additionally, exceptions generally are read narrowly. See, e.g., *Commissioner v. Clark*, 489 U.S. 726, 727 (1989). Thus the term "imminent" should be seen as limiting the category of death that triggers the exception. Here, the general rule of nondisclosure is set forth in Rule 1.6(a). The exceptions are set forth in Rule 1.6(b) including an exception for threats to commit a crime that will result in "imminent death." See *Model Rules of Professional Conduct* Rule 1.6(b) (1994).

remain silent despite a client's stated intent to murder unless that murder will be accomplished in the near future. Thus, the attorney appears to have no discretion to report his client's intentional course of poisoning a third party with arsenic or another cumulative poison until the attorney reasonably believes that the next dose will be fatal.<sup>168</sup>

The significance of the addition of "imminent," like other changes in the Rule, is less important for its practical effect in a disciplinary proceeding than in revealing the purpose and momentum of Rule 1.6—a heightened admonition against disclosure and a strengthened ethic of silence. The constriction of the category of harm deemed cognizable by Rule 1.6 and adoption of the qualifier "imminent" is more noteworthy when one considers the expansion of the concept of harm in modern law.<sup>169</sup> The law has expanded to recognize harm and the need for accountability for such harm even when the harm is remote in time from the defendant's conduct that created the risk to the injured party.<sup>170</sup>

Application of the Rule with its standard of "imminent death" is more difficult in the environmental context. Does the Rule allow an attorney to report information that the client's intended conduct creates a statistical likelihood of killing a percentage of people exposed to a hazardous substance? How high must the percentage of deaths be to justify disclosure? Does the fact that the victims are not individually identifiable other than as a percentage mean that disclosure is not

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168. This hypothetical is not intended to suggest that a board of professional responsibility would conclude that an attorney's decision to disclose the poisoning was a violation of the rule.

169. Recovery is allowed in modern tort law for a plaintiff whose life expectancy has been shortened by a defendant's negligent or intentional conduct. *See, e.g., Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136 (5th Cir. 1985) (life expectancy reduced); *May v. William Beaumont Hosp.*, 448 N.W.2d 497, 567 (Mich. Ct. App. 1989). Additionally, that the harm suffered by a plaintiff occurred after a long latency period will not necessarily defeat a plaintiff's claim for damages under modern law. *See In re Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. 32 (D.N.Y. 1990) (staying suits to consider claims of asbestos-related injuries together); *see also Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (6th Cir. 1983) (finding asbestos actions exempt from 10-year statute of limitations by retroactive application of 1979 Products Liability Act, Tenn. Code Ann. § 29-28-103(b)); *Jadlowski v. Owens-Corning Fiberglas Corp.*, 661 A.2d 814 (N.J. Super. Ct. App. Div. 1995) (affirming compensatory damages but reversing amount of punitive damages as excessive); *Ripa v. Owens-Corning Fiberglas Corp.*, 660 A.2d 521 (N.J. Super. Ct. App. Div. 1995) (affirming compensatory damages of over \$380,000 for wrongful death from asbestos exposure).

170. Asbestos cases provide examples of the expansion of liability. Recently the Court of Appeals for the Second Circuit held that the fact that plaintiffs have not yet experienced symptoms of disease from exposure to asbestos does not mean their action for negligent infliction of emotional damages should be dismissed. *See Buckley v. Metro-North Commuter R.R.*, 79 F.3d 1337 (2d Cir.), *cert. granted*, 117 S. Ct. 379 (1996); *Asbestos: Baltimore Jury Awards \$14 Million on Behalf of Mechanics in Brake Lining Case*, 11 Toxics L. Rptr. (BNA) 112 (June 26, 1996) (reporting on *Grewe v. Ford Motor Co.*, No. 96-112701 (Md. Cir. Ct. June 19, 1996)).

allowed? Of course, not all people who are exposed to a hazardous substance will die from the exposure. The designation of the hazardous or toxic nature of a substance is, to a significant extent, a function of the percentage of people or other organisms that will die or be affected adversely by the substance.<sup>171</sup> Difficulties of proof of injury are one reason that Congress and state legislatures have adopted the command and control strategy of environmental laws to alleviate the dangers of pollution to society.

#### IV. STATE MODIFICATIONS

The controversy engendered by Rule 1.6 in the ABA adoption process continued when the states considered adoption of the *Model Rules*. Most states have adopted the *Model Rules*, in an apparent move toward uniformity.<sup>172</sup> Unfortunately, the goal of a uniform and clear-cut rule has eluded the states. Only six jurisdictions enacted Model Rule 1.6

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171. By focusing on this point, some have suggested that rather than regarding carcinogens as hazardous, we should view those individuals who suffer ill effects of the substances as more susceptible than others. Through this prism, poisons are not poisonous; rather some people are allergic to them. See Sandra Blakeslee, *Genes Tell Story of Why Some Get Cancer While Others Don't*, N.Y. Times, May 17, 1994, at B6.

172. Thirty-nine jurisdictions have adopted the *Model Rules*, most with alterations to Rule 1.6. See *Ala. Rules of Professional Conduct* Rule 1.6 (1996); *Alaska Rules of Professional Conduct* Rule 1.6 (Michie 1996); *Ariz. Rules of Professional Conduct* ER 1.6 (1996); *Ark. Rules of Professional Conduct* Rule 1.6 (Michie 1996); *Colo. Rules of Professional Conduct* Rule 1.6 (1996); *Conn. Rules of Professional Conduct* Rule 1.6 (1996); *Del. Rules of Professional Conduct* Rule 1.6 (1996); *D.C. Rules of Professional Conduct* Rule 1.6 (1996); *Fla. Rules of Professional Conduct* Rule 4-1.6 (1996); *Haw. Rules of Professional Conduct* Rule 1.6 (1995); *Idaho Rules of Professional Conduct* Rule 1.6 (1996); *Ill. Rules of Professional Conduct* Rule 1.6 (West, 1996); *Ind. Rules of Professional Conduct* Rule 1.6 (1996); *Kan. Model Rules of Professional Conduct* Rule 1.6 (1996); *Ky. Rules of Professional Conduct* Rule 1.6 (1996); *La. Rules of Professional Conduct* Rule 1.6 (West 1996); *Md. Rules of Professional Conduct* Rule 1.6 (1996); *Mich. Rules of Professional Conduct* Rule 1.6 (1996); *Minn. Rules of Professional Conduct* Rule 1.6 (1996); *Miss. Rules of Professional Conduct* Rule 1.6 (1996); *Mo. Rules of Professional Conduct* Rule 1.6 (1996); *Mont. Rules of Professional Conduct* Rule 1.6 (1996); *Nev. Rules of Professional Conduct* Rule 156 (1995); *N.H. Rules of Professional Conduct* Rule 1.6 (1995); *N.J. Rules of Professional Conduct* Rule (1996); *N.M. Rules of Professional Conduct* Rule 16-106 (Michie 1996); *N.C. Rules of Professional Conduct* Rule 4 (1996); *N.D. Rules of Professional Conduct* Rule 1.6 (1996); *Okl. Rules of Professional Conduct* Rule 1.6 (1996); *Pa. Rules of Professional Conduct* Rule 1.6 (1996); *R.I. Rules of Professional Conduct* Rule 1.6 (1995); *S.C. Rules of Professional Conduct* Rule 1.6 (Law. Co-op 1996); *S.D. Rules of Professional Conduct* Rule 1.6 (Michie 1995); *Tex. Disciplinary Rules of Professional Conduct* Rule 1.05 (1995); *Utah Rules of Professional Conduct* Rule 1.6 (1996); *Wash. Rules of Professional Conduct* Rule 1.6 (1996); *W. Va. Rules of Professional Conduct* Rule 1.6 (1996); *Wis. Rules of Professional Conduct* SCR 20:1.6 (1996); *Wyo. Rules of Professional Conduct* Rule 1.6 (Michie 1996).

verbatim.<sup>173</sup> The modifications adopted by states range from dramatic rejections<sup>174</sup> to minor adjustments. The failure to secure a uniform confidentiality rule is a significant failure, especially because of the clear need for public understanding of the duty of confidentiality.

At best, in the absence of an adequate set of model rules around which the profession generally can coalesce, the several states will end up with respective and non-uniform codes and the fragmentation of the American Bar will be exacerbated. "The legal profession" may soon disintegrate into fifty, or more, collections of lawyers, each without a recognized right of self-regulation.<sup>175</sup>

After over a decade of influence from the *Model Rules*, the legal profession has not lost its power of self-regulation.<sup>176</sup> With regard to the rule on confidentiality, however, much of the above prediction rings true.<sup>177</sup> The scant empirical data on the Rule indicate that attorneys as well as clients lack a clear understanding of the duty of confidentiality.<sup>178</sup> The need for public knowledge and understanding of the ethical rule is strongest in this area because the purpose of the Rule

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173. These jurisdictions are Alabama, *Ala. Rules of Professional Conduct* Rule 1.6; Delaware, *Del. Rules of Professional Conduct* Rule 1.6 (1996); Louisiana, *La. Rules of Professional Conduct* Rule 1.6; Missouri, *Mo. Rules of Professional Conduct* Rule 1.6; Montana, *Mont. Rules of Professional Conduct* Rule 1.6; Nevada, *Nev. Rules of Professional Conduct* Rule 156. Rhode Island added the words "but is not obligated" to modify "may . . . reveal." *R.I. Rules of Professional Conduct* Rule 1.6.

174. A good number of states simply restored the exceptions deleted by the ABA House of Delegates from the Proposed Rule. See 2 Hazard, Jr. & Hodes, *supra* note 34, § AP4:104, at 1261 (Supp. 1994).

175. R.W. Nahstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 Wash. & Lee L. Rev. 421, 424-25 (1984).

176. Attorneys and bar associations naturally resist governmental regulation. They have concerns that governmental regulation could turn the attorney into an administrative watchdog or policeman of client. Failure to construct an ethical code that protects the interests of society (including the cumulative interest of third parties) may put the profession on course for such regulation, however.

177. Shelly Stucky Watson, *Keeping Secrets that Harm Others: Medical Standards Illuminate Lawyer's Dilemma*, 71 Neb. L. Rev. 1123, 1129-30 (1992).

It is doubtful that clients fully understand the confidentiality rules as they now stand—if indeed, the rules are explained to them at all. Even a lawyer who makes a good faith effort to explain the rules and exceptions to a client will likely leave clients confused, at least as to the details.

*Id.*

178. See Zacharias, *supra* note 1, at 396. For a summary of the empirical research in this area, see Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 Rutgers L. Rev. 81, 102-06 (1994).

is to encourage clients to seek representation and to disclose fully all the relevant facts to their attorneys.<sup>179</sup>

State modifications principally relate to the following elements of the Rule: (1) the permissive nature of the rule; (2) the extension of protection to all client "information"; (3) fraudulent client acts; (4) financial interests of third parties; (5) the duty to rectify client fraud; (6) the disclosure of future crimes; and (7) compliance with other law.<sup>180</sup>

Nine jurisdictions have made attorney disclosures of client information mandatory in designated circumstances by substituting "shall reveal" or similar language in place of the Rule's permissive language "may reveal."<sup>181</sup> The New Mexico rule states that a lawyer "should reveal" client information when a client's crime is likely to result in serious harm.<sup>182</sup> At least three jurisdictions retained the scope language of the *Model Code* ("confidences and secrets"), rejecting the term "information."<sup>183</sup> Twenty-two jurisdictions have broadened the category of "crime" that qualifies as an exception by deleting the category of "imminent death."<sup>184</sup> Of these jurisdictions fifteen have

179. The need for uniformity has increased because of public dissatisfaction and a public sentiment that lawyers are preoccupied with self-interest—either their own or that of their clients. In *The Lost Lawyer*, Dean Kronman chronicles the loss in the United States of the public image and reality of the "lawyer-statesman." See Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 11–13 (1993).

180. Some states fit more than one category. See, e.g., *Ariz. Rules of Professional Conduct* ER 1.6 (1996); *Haw. Rules of Professional Conduct* Rule 1.6 (1995).

181. See *Ariz. Rules of Professional Conduct* ER 1.6; *Conn. Rules of Professional Conduct* Rule 1.6 (1996); *Fla. Rules of Professional Conduct* Rule 4-1.6 (1996); *Haw. Rules of Professional Conduct* Rule 1.6; *Ill. Rules of Professional Conduct* Rule 1.6 (West 1996); *Nev. Rules of Professional Conduct* Rule 156 (1995); *N.J. Rules of Professional Conduct* Rule 1.6 (1996); *N.D. Rules of Professional Conduct* Rule 1.6 (1996); *Wis. Rules of Professional Conduct* SCR 20:1.6 (1996). Additionally, although Virginia has retained the *Model Code*, the state requires disclosure in specified circumstances. See *Va. Code of Professional Responsibility* DR 4-101(C), (D) (Michie 1996).

182. See *N.M. Rules of Professional Conduct* Rule 16-106(B) (Michie 1996).

183. See e.g., *D.C. Rules of Professional Conduct* Rule 1.6 (1996); *Mich. Rules of Professional Conduct* Rule 1.6 (1996); *Minn. Rules of Professional Conduct* Rule 1.6 (1996).

184. See *Ariz. Rules of Professional Conduct* ER 1.6; *Ark. Rules of Professional Conduct* Rule 1.6(b)(1) (Michie 1996); *Colo. Rules of Professional Conduct* Rule 1.6(b) (1996); *Fla. Rules of Professional Conduct* Rule 4-1.6; *Haw. Rules of Professional Conduct* Rule 1.6(c)(1); *Idaho Rules of Professional Conduct* Rule 1.6 (1996); *Ill. Rules of Professional Conduct* Rule 1.6(b); *Ind. Rules of Professional Conduct* Rule 1.6 (1996); *Kan. Model Rules of Professional Conduct* Rule 1.6 (1996); *Md. Rules of Professional Conduct* Rule 1.6 (1996); *Mich. Rules of Professional Conduct* Rule 1.6(c)(4) (1996); *Minn. Rules of Professional Conduct* Rule 1.6(b)(3); *Miss. Rules of Professional Conduct* Rule 1.6(b)(1) (1996); *N.H. Rules of Professional Conduct* Rule 1.6 (1995); *N.C. Rules of Professional Conduct* Rule 4(c)(4) (1996); *Okla. Rules of Professional Conduct* Rule 1.6(b)(1) (1996); *S.C. Rules of Professional Conduct* Rule 1.6(b)(1) (1995); *Tex. Disciplinary Rules of Professional Conduct* Rule 1.05(c)(7); *Wash. Rules of Professional Conduct* Rule

broadened the exception further by rejecting the qualifier "substantial" to the category of "bodily harm."<sup>185</sup> Eleven jurisdictions have added protection for the financial interest of third parties by including this interest within the exceptions to the prohibition.<sup>186</sup> Ten jurisdictions include "fraudulent" as well as criminal acts within the exception for harm, extending greater protection to third parties.<sup>187</sup> Thirteen jurisdictions allow disclosures to "rectify fraud" when the attorney's services have been used to further the fraud.<sup>188</sup> Fifteen jurisdictions include an exception for disclosures to comply with other law.<sup>189</sup> These

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1.6(b)(1) (1996); *W. Va. Rules of Professional Conduct* Rule 1.6(b)(1) (1996); *Wis. Rules of Professional Conduct* SCR 20:1.6(b); *Wyo. Rules of Professional Conduct* Rule 1.6(b)(1) (Michie 1996).

185. See *Ark. Rules of Professional Conduct* Rule 1.6(b)(1); *Colo. Rules of Professional Conduct* Rule 1.6(b); *Idaho Rules of Professional Conduct* Rule 1.6; *Ill. Rules of Professional Conduct* Rule 1.6(b) (substituting "serious bodily harm" for substantial); *Ind. Rules of Professional Conduct* Rule 1.6; *Kan. Model Rules of Professional Conduct* Rule 1.6; *Mich. Rules of Professional Conduct* Rule 1.6(c)(4); *Minn. Rules of Professional Conduct* Rule 1.6(b)(3); *Miss. Rules of Professional Conduct* Rule 1.6(b)(1); *N.C. Rules of Professional Conduct* Rule 4(c)(4); *Okla. Rules of Professional Conduct* Rule 1.6(b)(1); *S.C. Rules of Professional Conduct* Rule 1.6(b)(1); *Wash. Rules of Professional Conduct* Rule 1.6(b)(1); *W. Va. Rules of Professional Conduct* Rule 1.6(b)(1); *Wyo. Rules of Professional Conduct* Rule 1.6(b)(1).

186. See *Alaska Rules of Professional Conduct* Rule 1.6 (Michie 1996); *Conn. Rules of Professional Conduct* Rule 1.6 (1996); *Haw. Rules of Professional Conduct* Rule 1.6(c)(1); *Md. Rules of Professional Conduct* Rule 1.6(b)(1); *N.J. Rules of Professional Conduct* Rule 1.6(b)(1); *N.H. Rules of Professional Conduct* Rule 1.6(b)(1); *N.M. Rules of Professional Conduct* Rule 16-106(C); *N.D. Rules of Professional Conduct* Rule 1.6(b)(1) (1996); *Pa. Rules of Professional Conduct* Rule 1.6(b)(1) (1996); *Utah Rules of Professional Conduct* Rule 1.6(b)(1) (1996); *Wis. Rules of Professional Conduct* SCR 20:1.6.

187. See *Alaska Rules of Professional Conduct* Rule 1.6(a); *Haw. Rules of Professional Conduct* Rule 1.6(c)(1); *Md. Rules of Professional Conduct* Rule 1.6(b)(4); *Mich. Rules of Professional Conduct* Rule 1.6(c)(3); *N.J. Rules of Professional Conduct* Rule 1.6(b)(1); *N.D. Rules of Professional Conduct* Rule 1.6(d); *Okla. Rules of Professional Conduct* Rule 1.6(b)(2); *Tex. Disciplinary Rules of Professional Conduct* Rule 1.05(c)(7); *Utah Rules of Professional Conduct* Rule 1.6(b)(2); *Wis. Rules of Professional Conduct* SCR 20:1.6(b).

188. See *Conn. Rules of Professional Conduct* Rule 1.6(c)(2); *Haw. Rules of Professional Conduct* Rule 1.6(c)(2); *Md. Rules of Professional Conduct* Rule 1.6(b)(2); *Mich. Rules of Professional Conduct* Rule 1.6(c)(3); *Minn. Rules of Professional Conduct* Rule 1.6(b)(4); *N.J. Rules of Professional Conduct* Rule 1.6(c)(1); *N.D. Rules of Professional Conduct* Rule 1.6(f); *Okla. Rules of Professional Conduct* Rule 1.6(b)(2); *Pa. Rules of Professional Conduct* Rule 1.6(c)(2); *S.D. Model Rules of Professional Conduct* Rule 1.6(c)(3) (1995); *Tex. Disciplinary Rules of Professional Conduct* Rule 1.05(c)(8); *Utah Rules of Professional Conduct* Rule 1.6(b)(2); *Wis. Rules of Professional Conduct for Attorneys* SCR 20:1.6(c)(1).

189. See *D.C. Rules of Professional Conduct* Rule 1.6(d)(2)(A), (B); *Haw. Rules of Professional Conduct* Rule 1.6(c)(6); *Ill. Rules of Professional Conduct* Rule 1.6(c)(1); *Kan. Model Rules of Professional Conduct* Rule 1.6(b)(2); *Ky. Rules of Professional Conduct* Rule 1.6(b)(3) (1996); *Md. Rules of Professional Conduct* Rule 1.6(b)(4); *Mich. Rules of Professional Conduct* Rule 1.6(c)(2); *Minn. Rules of Professional Conduct* Rule 1.6(b)(2); *Miss. Rules of Professional Conduct* Rule 1.6(c); *N.J. Rules of Professional Conduct* Rule 1.6(c)(3); *N.C. Rules of Professional Conduct* Rule 4(c)(3); *N.D. Rules of Professional Conduct* Rule 1.6(g); *Okla. Rules of Professional*



state departures from Model Rule 1.6 are evidence of state dissatisfaction with the ABA's position on confidentiality.

## V. TWO VIEWS OF THE PROFESSION

The underlying view of the proper role of the lawyer influences dramatically the way attorneys regard the duty of confidentiality. Two views predominate the scholarship and institutional statements of what it means to be an attorney in this society: (1) the lawyer as champion, and (2) the lawyer as officer of the court.

### A. *The Lawyer as Champion*

One conceptualization of the lawyer focuses on the intrinsic value of confidentiality,<sup>190</sup> taking the view that the relationship of the attorney to the client is an absolute value, integral to the right of fair representation.<sup>191</sup> This view is premised on the belief that the duty of confidentiality is a nonnegotiable element of our judicial system that must not be overridden except in cases so dramatic that reporting should occur in spite of any rule. It assumes that releasing the attorney's pledge of silence endangers the protections of the advocacy system of justice.

The image of lawyer as champion or special friend to the client is powerful. The lawyer provides more than comfort. He comes at a time when the client is in greatest need. At risk of losing money, property, liberty, or even life at the hands of the judicial system, the client looks to the attorney. This narrative is particularly compelling in the case of

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Conduct Rule 1.6(c); *Tex. Disciplinary Rules of Professional Conduct* Rule 1.6(c)(4); *Utah Rules of Professional Conduct* Rule 1.6. Like the Model Rule jurisdictions that made this change, Code states also recognize the attorney's right to disclose information to comply with other law. See, e.g., *Ga. Code of Professional Responsibility* DR 4-101(C)(2) (1996); *Iowa Code of Professional Responsibility for Lawyers* DR 4-101(C)(2) (1996); *Mass. Code of Professional Responsibility* DR 4-101 (C)(2) (1996); *Neb. Code of Professional Responsibility* DR 4-101(C)(2) (West 1995); *N.Y. Code of Professional Responsibility* DR 4-101(C)(2) (1995); *Ohio Code of Professional Responsibility* DR 4-101(C)(2) (Banks-Baldwin 1996); *Or. Code of Professional Responsibility* DR 4-101 (C)(2) (1996); *Tenn. Code of Professional Responsibility* DR 4-101(C)(2) (1995); *Vt. Code of Professional Responsibility* DR 4-101(C)(2) (1995); *Va. Code of Professional Responsibility* DR 4-101 (C)(2) (1996).

190. In fact, the arguments for the amoral role of the attorney are more diverse than this brief summary can impart. See, e.g., Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, in *The Ethics of Lawyers* 57 (David Luban ed., 1994); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *Yale L.J.* 1060 (1976).

191. See Abraham Abramovsky, *A Case for Increased Confidentiality*, 13 *Fordham Urban L.J.* 11 (1984-1985).

criminal defendants.<sup>192</sup> In this model—whether in the criminal or civil context—the lawyer offers a nonjudgmental ear similar to that associated with the psychotherapist or priest. She also offers the skills necessary to serve the client in a complex system of justice. She is as much savior as champion, an alter ego with the skills of Portia<sup>193</sup> but with no interest in judging the client's motives or actions.

The view of the attorney as champion has long historical precedent. Courts, scholars, and boards of professional responsibility speak of the lawyer's duty of "single allegiance,"<sup>194</sup> "absolute loyalty,"<sup>195</sup> and "undivided fidelity"<sup>196</sup> to the client.

When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion.<sup>197</sup>

While this view has gained momentum in an age of relativism,<sup>198</sup> the relationship of client and attorney appears always to have inspired strong and sometimes florid praise.<sup>199</sup> Though stated in terms of the attorney's

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192. See generally Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. Rev. 687 (1991).

193. See generally William Shakespeare, *The Merchant of Venice*.

194. See, e.g., *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 131 N.Y.S.2d 393, 401 (1954).

195. See Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 Minn. L. Rev. 227, 235 (1987). "A lawyer's duty of absolute loyalty to his client's interests does not end with his retainer. He is enjoined for all time . . . from disclosing matters revealed to him by reason of the confidential relationship." *Id.* (quoting T.C. Theater Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953)).

196. See *Canons of Professional Ethics* Canon 6 (1908) ("The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."); see also e.g., *Moritz v. Medical Protective Co.*, 428 F. Supp. 865, 872 (D. Ind. 1977) (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 282 (1950)); *Parsons v. Continental Nat'l Am. Group*, 550 P.2d 94 (Ariz. 1976).

197. *Grievance Comm. v. Rottner*, 203 A.2d 82, 84 (Conn. 1964).

198. Chief Justice Burger asserts that we apply "the flawed notion of relativism to the law profession—with evil and unnecessary consequences." Warren E. Burger, *Where Some Rascals Are Taking Our Law Profession*, Preface to Peter Megargee Brown, *Rascals: The Selling of the Legal Profession* 9 (1989).

199. See *United States v. Costen*, 38 F. 24, 24 (C.C.D. Colo. 1889). As the court described:

[I]t is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that lawyer's tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation, and betrays or seeks to betray any

overall duty rather than with specific reference to confidentiality, Lord Brougham's famous quote identifies loyalty to the client as the absolute duty of the attorney:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.<sup>200</sup>

Lord Brougham's explication of the attorney's highest (and indeed "only") duty presents a religious (almost romantic) zeal for the notion of loyalty to the client.<sup>201</sup> But this statement's rhetorical force outweighs its content. Although the cost of loyalty is stated in dramatic terms ("destruction" and "confusion"), the context for the statement is Brougham's world, a time in which standards "reckless of the consequences" posed lesser risks than today. In short, the rhetoric predated the nuclear and chemical age we inhabit. At any rate, the more typical justification for the intrinsic view of confidentiality<sup>202</sup> focuses not

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information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust.

*Id.*

200. David Mellinkoff, *The Conscience of a Lawyer* 189 n.10 (1973) (quoting from second trial of Queen Caroline in 1821). For background on the trial of Britain's Queen Caroline, which gave rise to Lord Brougham's famous statement, see Hazard, Jr., *supra* note 40, at 1244 (noting that Lord Brougham's statement related to his representation of Queen in divorce action brought against her by King of England and that, as Queen's attorney, Brougham intended to defend Queen, with countercharges that would jeopardize King's title to throne).

201. To the extent that the ethic of silence is based on something other than social utility, a principle of individual allegiance on the order of that expressed by Lord Brougham, then it is in society's interest to take a more active role in regulating the legal profession.

[C]laims to individual and social utility touch on the *raison d'être* of the professions themselves; but they are also potentially treacherous. For if it were found that a professional group or subspecialty not only did not help but actually hurt individuals, and increased the social burden of, say, illness or crime, then there would be a strong case for not allowing it to promise professional confidentiality. To question its special reason for being able to promise confidentiality of unusual strength is therefore seen as an attack on its special purposes, and on the power it acquires in being able to give assurances beyond those which non-professionals can offer.

Bok, *supra* note 8, at 122.

202. See *Model Rules of Professional Responsibility* pmbl. para. 10 (1994).

simply on cleaving to the client but on the transcendent<sup>203</sup> benefit to the public interest.<sup>204</sup>

### B. *The Lawyer as Officer of the Court*

The concept of the attorney as an officer of the court<sup>205</sup> is also old and meaningful.<sup>206</sup> Lawyers traditionally were viewed as the guardians of the law, serving the social good.<sup>207</sup> Some scholars suggest that the lawyer is not only an officer of the court but also an “officer of the law” and a “Guardian of Due Process.”<sup>208</sup> Rather than rejecting *in toto* the champion model of the attorney’s role, the lawyer-as-officer model simply rejects the absolute form of the champion concept.<sup>209</sup> It incorporates the concept

203. Lawyers answer the charge that they subjugate morality to the needs of the client, by arguing that loyalty to the client serves “an institutional justice higher than conventional morality.” William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29, 308.

204. The statement is in contrast to the utilitarian justification set forth in the *Model Rules*. See *supra* Part III.

205. See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 Vand. L. Rev. 39 (1989). Professor Gaetke charges that the title is now disingenuous and misleading to the public. He urges the profession to “abandon the characterization” or “adopt . . . duties [that] give meaning to the role of officer of the court.” *Id.* at 90–91.

206. By this, the author does not intend to assert that the meaning is clear. Although this phrase has been employed to describe the role of attorneys for generations, its legal significance is far from certain. See Wolfram, *supra* note 32, at 17–18. Wolfram argues that the term connotes few special privileges, but may carry with it special burdens such as higher standards of honor and integrity. *Id.*

207. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943) (“Ours is a learned profession, not a mere money-getting trade.”). A U.S. Supreme Court Justice also noted the role of the legal profession in *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466 (1988):

One distinguishing feature of any profession . . . is that membership entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. . . . Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service.

*Id.* at 488–89 (O’Connor, J. dissenting); see also Sandra Day O’Connor, *Foreword* to Rudolph J. Gerber, *Lawyers, Courts, and Professionalism* at xi, xi–xii (1989). See generally Samuel Haber, *The Quest for Authority and Honor in the American Professions 1750–1900* (1991).

208. See Lawry, *supra* note 55, at 318–19, 326.

209. See Wolfram, *supra* note 32, § 6.7.3, at 301; Lawry, *supra* note 55, at 326–35. Wolfram states:

[T]he normal expectation of lawyer loyalty to a client’s interests is hardly an absolute. It does not purport to be a reason why a lawyer must always maintain silence regardless of the claims and interests of third persons. . . . [A] lawyer’s dutiful silence about a client’s intention to commit a serious crime might cause such a risk of a harm to another person that the normal prohibition against voluntary disclosure should yield.

of attorney as champion, but qualifies the role of attorney on the utilitarian basis of service to society and the system of justice. The focus of this model is the obligation of the attorney to the system as a whole: the champion must play by the rules. While recognizing the attorney has a duty of loyalty to the client,<sup>210</sup> this model sets limits on the duty, reminding us that the attorney's duty has never been to win at all costs. The attorney has no duty to keep the client's secrets, for example, if to keep quiet would perpetrate fraud on the court.<sup>211</sup>

## VI. THE ATTORNEY-CHAMPION OF THE *MODEL RULES*

The above views of the attorney's role are more than theoretical. They are the wellspring for choice and action. While each attorney makes personal choices regarding his role as a professional, the institutional statement of ethical rules set forth in the *Model Rules* has special significance. It influences the views of individual attorneys regarding what it means to be an attorney. By virtue of its adoption in individual jurisdictions, it invests the standard with regulatory force that can result in sanctions against the attorney whose personal code differs from it.

The two views of the attorney's role set forth above cannot be harmonized. One (officer) is a qualification of the other (champion). Thus, any analytical statement of professional conduct must incorporate principally one view or the other to provide a consistent framework. This part of the Article looks to the *Model Rules* and finds that the concept of the attorney-champion is the major force shaping its standards.

The Preamble to the *Model Rules* identifies the conflicting interests to be addressed by the rules of ethics and notes the function of the *Model Rules*.

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Wolfram, *supra* note 32, § 6.7.3, at 301.

210. See Wolfram, *supra* note 32, § 4.1, at 146.

211. See generally Michael K. McChrystal, *Lawyers and Loyalty*, 33 Wm. & Mary L. Rev. 367 (1992). Under the *Model Code*, the attorney's duty of confidentiality does not mean the attorney should stand by silently while a client commits fraud on the court or on another individual. See *Model Code of Professional Responsibility* DR 4-101 (1980). Under the earlier canons, the "office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client." *Canons of Professional Ethics* Canon 15 (1908). The *Model Rules* also require revelations to prevent fraud on the court. See *Model Rules of Professional Conduct* Rules 1.2(d), 1.16(b)(1), 3.3 (1994).

In the nature of law practice . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person . . . . The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.<sup>212</sup>

This Preamble statement sets forth both the scope of its authority and the process of decision-making on ethical conflicts with subtlety. The range of its prescriptions is plenary: it resolves "such conflicts," referring to the problems described above ("all difficult ethical problems"). Decisions about conflicts are entrusted to two factors: "sensitive professional and moral judgment" and the "basic principles" of the *Model Rules*. The influence of the *Model Rules* is stated obliquely: resolution of conflicts occurs through the attorney's "sensitive" judgment as it is "guided" by the *Model Rules*—or rather (more obliquely) by the "basic principles" found "underlying" the *Model Rules*. The structure of this sentence allows the reader to lose track of the relative weight of these factors. When personal judgment and the *Model Rules* diverge, the *Model Rules* must control.<sup>213</sup> Of necessity, a rule must control what is or is not a violation of the norm it establishes. Thus, despite the above language, the attorney's exercise of judgment is merely an application of the edicts of the *Model Rules*.

Although the *Model Rules* do not declare outright their vision of the attorney's role, the range of action allowed for attorneys makes clear that the *Model Rules* view of the attorney is predominantly that of the attorney-champion. Rule 1.2 forbids the attorney to counsel or assist a client in fraudulent or criminal conduct.<sup>214</sup> Rule 1.16 requires the attorney to withdraw or to refuse to represent anyone when the representation will result in a violation of the professional rules or the law.<sup>215</sup> These rules require that the attorney disassociate himself from a

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212. *Model Rules of Professional Conduct* pmb1. para. 8 (1994).

213. The attorney will have her own judgment (and a view or personal code) but it lacks the force of the view adopted by the institution. In the same way each of us can have an opinion about a case. But it is the court's "opinion" that has the force of law.

214. *Model Rules of Professional Conduct* Rule 1.2.

215. *Model Rules of Professional Conduct* Rule 1.16.

client once he knows the client's criminal or fraudulent purpose (another question that can be murky). But neither rule declares an affirmative duty to rectify the harm or to warn others of the danger created by the client.<sup>216</sup> The attorney must back away from wrongful conduct but protection of the system or individuals is subjugated by the model of the champion. Thus, the attorney's loyalty is tied to the immediate interests of the client; he must do nothing to compromise the client's interest even when the client poses danger to others.<sup>217</sup>

The *Model Rules* seek to confine the attorney's analysis of disclosure issues to the universe they construct. Deletion of references to disclosures required by other law obscures the backdrop of substantive law and its relation to the attorney's decision, suggesting that the stage occupied by Rule 1.6 provides a full inquiry.<sup>218</sup> Additionally, the *Model Rules* declare that the attorney's decision to refrain from disclosing client information "should not be subject to reexamination."<sup>219</sup> This declaration is presumably directed to the boards of professional responsibility and the judiciary, since these are the forums for reexamination of attorney conduct. In a similar vein, the Scope statement of the *Model Rules* asserts that disclosure "may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges."<sup>220</sup> This statement presupposes the litigation context for any confidentiality issue and narrows the influence of positive law to two evidentiary issues.

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216. The line drawn by these rules shows how the *Model Rules* have evolved away from the concept of the attorney as a counselor who points out "those factors which may lead to a decision that is morally just as well as legally permissible." *Model Code of Professional Responsibility* EC 7-8 (1980).

217. Harm to another is insufficient to require disclosure. The interest in being free from danger is not sufficient to require disclosures. Only when the danger to another coalesces with the most culpable client conduct is disclosure within the discretion of the attorney. See *supra* note 77 and accompanying text.

218. See *Model Rules of Professional Conduct* Rule 1.6 cmt. 20 (1994). The *Model Code* specifically noted the predominance of positive law in its text. See *Model Code of Professional Responsibility* DR 4-101(C)(2) (1980).

219. See *Model Rules of Professional Conduct* Scope para. 20 (1994). The proposed final draft of section 117A of the *Restatement (Third) of Law Governing Lawyers* levels the field to some extent, declaring that either decision (disclosure or silence) should not be reexamined. *Restatement (Third) of Law Governing Lawyers* § 117A (Proposed Final Draft No. 1, 1995).

220. See *Model Rules of Professional Conduct* Scope para. 19 (1994).

## VII. CONFIDENTIALITY AND CATASTROPHES: WEIGHING THE RISKS

Several “givens” operate in the area of confidentiality regardless of the precise wording of the rule. The first is obvious: only information known to the attorney can be disclosed. The second is related: few people declare their intention to commit a crime—to their attorneys or to anyone.<sup>221</sup> Third, the lawyer faces a difficult balancing process, no matter what language the rule on confidentiality employs. Risk is a function consequence and probability. The level of certainty regarding each factor will vary from case to case. When a client threatens peril, the lawyer must assess both the gravity of the harm threatened and the likelihood that it will occur. Although indeterminacy makes for difficult judgment calls, tort principles require that all professionals,<sup>222</sup> and indeed all people, make just such difficult judgment calls in just such an indeterminate world.<sup>223</sup> The attorney, like the reasonable person, must make the determination to the best of his abilities, based on the facts known at the time.<sup>224</sup>

The system of belief presented in the *Model Rules* assumes a world in which the harm perpetrated by any individual client has a limited sphere. The *Model Rules*’ preference for the risk of improvident silence over the risk of improvident disclosure is implicit in the structure of Rule 1.6. This preference is evidenced by the *Model Rules*’ elevation of a subsidiary aspect of social utility, the duty of confidentiality.<sup>225</sup>

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221. Proponents of a broad prohibition against disclosure focus on an increasing number of revelations made to attorneys based on a belief that attorneys will successfully counsel against harmful conduct.

222. The Court recognizes that it may be difficult for medical professionals to predict whether a particular mental patient may pose a danger to himself or others. This factor alone, however, does not justify barring recovery in all situations. The standard of care for health professionals adequately takes into account the difficult nature of the problem facing psychotherapists.

*Durflinger v. Artiles*, 727 F.2d 888, 904 (10th Cir. 1984) (imposing duty on hospitals to guard against patients’ dangerous mental conditions discoverable by exercise of reasonable care); *see also* *Foley v. Bishop Clarkson Mem’l Hosp.*, 173 N.W.2d 881, 884 (Neb. 1970).

223. Arguably attorneys are better prepared to make such judgment calls than other professionals because of their legal training. *See, e.g.*, Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. Legal Educ. 313 (1995) (concluding that core activities of lawyering are problem-solving and decision-making).

224. *See* *Watson*, *supra* note 177, at 1132 (arguing that “inaccuracy in predicting violence” should not preclude duty to warn in clear cases).

225. The Rule invests the subsidiary principle (confidentiality) with conclusive effect, making it a surrogate for social utility. By generalizing the good of confidentiality, the Rule’s analysis substitutes the surrogate for the principle and justifies the belief that confidentiality always serves



The ABA's decision to reduce the likelihood of disclosure is based on an intuitive assessment of the harm that could result from disclosures against a client's interest. Rule 1.6 is evidence of a general aversion to the risk of improvident disclosures.<sup>226</sup> Although the Rule implicitly prefers the risk of improvident silence to the risk of improvident disclosure, there is nothing in the legislative history or the *Model Rules* suggesting that the delegates considered the corollary risk of silence. Because the modern world presents more opportunities for environmental catastrophes and widespread harm,<sup>227</sup> the debate on confidentiality must now assess the overlooked risk of improvident silence, the danger that significant harm can befall individuals or even the entire community. Ultimately, the evolving debate should consider the social utility of any formulation of the Rule, including assessment of both disclosure and silence.<sup>228</sup> The risk of improvident disclosure under a viable exception for peril must be weighed against the risk of improvident silence under the current rule.

#### A. *The Risk of Improvident Disclosures*

The element of indeterminacy may have influenced the ABA to adopt the categorical prohibition of Rule 1.6—as insurance against attorneys revealing client confidences in circumstances that do not present true peril. Rule 1.6 refuses to acknowledge the possibility that disclosure

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the public good. However, any benefit is merely theoretical, and the focus on the surrogate of confidentiality destroys social utility when the harm is extreme.

226. A similar phenomenon can be seen in the EPA's treatment of "old" (established) environmental risks in comparison with "new" (emerging) risks. In *Reducing Risk: Setting Priorities and Strategies for Environmental Protection*, the Science Advisory Board compared the EPA's treatment of established risks with newly recognized risks and found the EPA prefers the established risk. For such risks, the EPA sets standards. In the case of newly developed risks, by contrast, the EPA is more likely to use "screening," which denies industry the right to create the risk until it establishes the relative safety of the product. See Science Advisory Bd., Environmental Protection Agency, *Reducing Risk: Setting Priorities and Strategies for Environmental Protection* (1990), reprinted in Kenneth A. Manaster, *Environmental Protection and Justice: Readings and Commentary on Environmental Law and Practice* 66, 71 (1995).

227. The American public and legislatures now expect and demand heightened protection from environmental dangers as a matter of policy. J. William Futrell, President, Environmental Law Institute, noted the change: "Environmental law's greatest achievement is its codification of a change in ethics—a legal recognition that in the second half of the 20th century, individual and governmental responsibility extends to the natural world. Congress has adopted ecological values as national goals." *The Green Hasn't Faded After 25 Years*, Nat'l L.J., June 19, 1995, at C1.

228. Environmental professionals might call this analysis a risk assessment plan.

could be appropriate in some circumstances.<sup>229</sup> This regulatory scheme,<sup>230</sup> like the counsel of the senior partner in the Auchincloss story,<sup>231</sup> advocates a result rather than providing guidance.<sup>232</sup> Consequently, an assessment of the likelihood of improvident disclosures and the resulting diminution of the public perception that attorneys keep confidences is necessary. Whether the creation of a viable normative-based exception to the prohibition against disclosure will result in improvident disclosures by attorneys depends on more than the Rule itself. Confidentiality occupies such a central place in the world of attorneys that improvident disclosure seems unlikely.

The duty is deeply ingrained in society's way of regarding attorneys; it is a central part of the attorney's public persona and of the individual self-image of most attorneys. Preservation of client confidences is the strongest professional norm of attorneys; both attorneys and legal scholars consider preservation of the client's secrets the first commandment of the practice of law.<sup>233</sup> The group culture of attorneys demands silence,<sup>234</sup> projecting an ethos of almost religious proportions.<sup>235</sup> Additionally, the attorney's close connection with the client<sup>236</sup> and the client's interest can make disclosure almost

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229. No illustrative case is provided in the comments or preamble to show the correct operation of the exception—perhaps for fear that to acknowledge a duty to disclose peril might result in cases of improvident disclosures based on too insignificant a threat.

230. Rules of professional conduct are not generally spoken of as regulations. Nevertheless, they serve to regulate the profession. "To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated." *Model Rules of Professional Conduct* pmbl. para. 10 (1994).

231. See Auchincloss, *supra* note 128, at 194, 210–11.

232. "Moral questions are often too complex and multifaceted to lend themselves to rule-bound solutions. But if basic premises, legal rules, and the analysis of relevant factors are not determinative, where does the lawyer turn?" Pepper, *supra* note 113, at 1607 (citations omitted).

233. Wolfram, *supra* note 32, § 6.1.4, at 247 ("Too often judges and commentators treat the matter as if the only consideration worth discussing were [sic] the protection of client confidentiality.").

234. On the strength of craft norms, see Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 *Duke L.J.* 1051, 1058–72 (1995).

235. See 2 Hazard, Jr. & Hodes, *supra* note 34, § AP4:105, at 1265 (noting New Jersey's experiment requiring fuller disclosure may founder because of view that adversary system is "sacred").

236. One of the historical justifications of the duty of confidentiality was that the lawyer is the client's servant. See Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 *Yale L.J.* 1226, 1228–29 (1962).

unthinkable.<sup>237</sup> The natural tendency of attorneys (and people in general) to identify with the causes and viewpoints they represent is another powerful motivator.<sup>238</sup> Although most people feel a sense of identification and loyalty to employers and clients, such identification appears to run deeper in the law where clients often think of their lawyer as the "champion" on their "side" and lawyers view their roles as "protecting" clients and defeating "opponents."

Often attorneys develop personal relationships with clients that enhance this identification. They also have a sense of accountability to clients, especially when the client is a powerful individual or corporation that provides significant revenues to the attorney or her firm.<sup>239</sup> The need to pay bills and an aversion to controversy at the personal level also discourages disclosure. The desire to put aside, defer, or ignore hard choices is a natural inclination of most people, not only of attorneys. Nondisclosure is the path of least resistance, the "easier" choice because it is passive. The attorney's decision is generally hidden from scrutiny. In most cases—whether they are environmental accidents or murders—no one knows what the attorney knew and when she knew it. Finally, liability issues come into play. When an attorney considers disclosing client information, he will surely consider the possibility that his client

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237. The view that the duty of confidentiality has intrinsic value (as opposed to the instrumental value) adds support to the choice of nondisclosure regardless of the risks to third parties or the public. See Fried, *supra* note 35.

238. Cf. *Model Rules of Professional Conduct* Rule 1.2 cmt. 3 (1994) (noting that "[r]epresent[ation] of ] a client does not constitute approval of the client's views or activities"). This concept is essential to the role of attorneys in insuring representation for all parties. See Charles W. Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise, The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 214 (David Luban ed., 1983); Wolfram, *supra* note 32, § 10.2.3, at 576-78. The need for and reality of this concept does not destroy the human inclination to identify with the views one represents, however. This phenomenon is recognized by jurisdictions that prohibit issue conflicts. See, e.g., John S. Dzienkowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457 (1993). The response to proposed Rule 1.6 provides an example of identification with client interests.

The American Trial Lawyers Association (ATLA) was so outraged by the Kutak Commission's work, particularly its proposals on confidentiality, that it drafted a complete alternative, the American Lawyer's Code of Conduct (ALCC). The Preface to the ALCC states: "Our first principle remains that a client must be able to confide absolutely in a lawyer, or there may be little point in anyone's having a lawyer. We have rejected one concept that the Kutak Commission apparently espouses, that lawyers have a general duty to do good for society that often overrides their specific duty to serve their clients."

Koniak, *supra* note 156, at 1442 (quoting ALCC Preface).

239. Corporate counsel may be more likely than retained counsel to learn of hazardous releases and the potential for environmental disasters simply because they are more likely to be aware of the day-to-day operations of a plant or hazardous waste facility.

will sue him for his breach of loyalty if his decision turns out to be wrong.

Together, the above factors reduce significantly the likelihood of improvident or frivolous disclosures. Nevertheless, some risk of disclosure remains. This risk must be balanced against the need for a viable exception when significant hazards are threatened.

## B. Improvident Silence and Environmental Catastrophes

The scenario of widespread disaster is instructive in a modern world. Today devastating harm is a real risk rather than a nightmare fantasy.<sup>240</sup> Although the United States has not experienced a nuclear disaster of the magnitude of Chernobyl, the Three Mile Island disaster<sup>241</sup> raises concerns about the use of nuclear energy.<sup>242</sup> Hazardous substances present a separate danger.<sup>243</sup> Millions of tons of hazardous substances are produced each year in this country by private industry,<sup>244</sup> federal

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240. See S. Rep. No. 101-228, at 134 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3519. Moreover, world destruction is, unfortunately, also a legitimate possibility. In cases of nuclear threats, an attorney's choice should be in favor of saving the planet rather than preserving the client confidence—even under the intrinsic view of the duty of confidentiality. The costs to the legal system can be outweighed by the physical costs of disaster. After all, you need a world in order to have a legal system.

241. See *Radiation Exposure: Three Mile Island Accident May Have Injured People Living Near Reactor*, Cancer Wkly. Plus, Aug. 26, 1996, available in WESTLAW, Cancer Weekly Plus File; *Three Mile Island Suits Dismissed by U.S. Judge*, Wall St. J., June 10, 1996, at A5 (describing dismissal of claims of more than 2000 people).

242. Although some argue that a Chernobyl-type disaster is not possible in the United States, see, e.g., Andrew Melnykovich, *Chernobyl Filled Prescription for Disaster that Couldn't Be Written in U.S.*, Louisville Courier-J., Apr. 21, 1996, at S12, others doubt the safety of U.S. nuclear power plants. See, e.g., Blaine Harden, *Nuclear Reactions*, Wash. Post, May 5, 1996, at W12 (reporting federal estimate of cleanup costs for Hanford nuclear site is \$230 billion over 75 years); see also Eric Pooley, *Nuclear Warriors: Two Gutsy Engineers in Connecticut Have Caught the Nuclear Regulatory Commission at a Dangerous Game That it Has Played for Years: Routinely Waiving Safety Rules To Let Plants Keep Costs Down and Stay Online*, Time, Mar. 4, 1996, at 46, 46.

243. Despite recent declines in toxic releases, the amount of toxic substances released into the air and water are substantial: 2.26 billion pounds in 1994. See *Emergency Planning: Toxic Chemical Releases Decrease By 8.6 Percent in 1994, Report Says*, 27 Env't Rptr. (BNA) 531 (July 5, 1996); see also Deeann Glamser, *Plan to Incinerate Nerve Gas Sets Off Alarms*, USA Today, Mar. 30, 1996, at 8A.

244. "Despite considerable uncertainty, most estimates of the amount of RCRA hazardous waste generated by the civilian sector are around 250 million tons per year." Michael B. Gerrard, *Whose Backyard, Whose Risk: Fear and Fairness in Toxic and Nuclear Waste Siting* 8 (1994) (citing U.S. Gen. Accounting Off., Pub. No. GAO/PEMD-90-3, *Hazardous Waste: EPA's Generation and Management Data Need Further Improvement* (Feb. 1990); *Review of EPA's Capacity Assurance Program: Hearings Before the Subcomm. on Environment, Energy and Natural Resources of the House Comm. on Government Operations*, 101st Cong., 8 (1991)).

facilities,<sup>245</sup> hospitals, clinics, physicians' offices,<sup>246</sup> and other sources.<sup>247</sup> Because of the dramatic risks posed by these sources, the next mass murderer may be the perpetrator of an environmental crime.<sup>248</sup>

Although the threat of widespread disaster<sup>249</sup> presents the extreme (and perhaps easiest) case, any known threat of an environmental catastrophe tests the duty of confidentiality. These threats dramatize the competing interest of public safety. Does Rule 1.6 sufficiently protect the interests of workers and area residents when negligent work practices set the stage for a chemical catastrophe? If imminent danger exists, should the right to disclose the danger turn on whether the client conduct is classified as criminal or merely fraudulent or negligent?<sup>250</sup> The answers to these questions require revision to Rule 1.6.

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245. See *Emergency Planning: Toxic Chemical Releases Decrease By 8.6 Percent in 1994, Report Says*, *supra* note 243 (noting that federal facilities reported releases of toxic substances in 1994 of 9.8 million pounds). Hazardous wastes also contribute to the problem. "The U.S. military generates approximately 700,000 tons of hazardous wastes annually, including such substances as paint thinner, spilled solvents, hydraulic fuel, aviation fuel, fuel tank and sewage sludges, and herbicides." Gerrard, *supra* note 244, at 15 (citing Michael Satchell, *Uncle Sam's Toxic Folly*, U.S. News & World Rep., Mar. 27, 1989, at 20, 20). The U.S. government has "caused some of the worst environmental disasters known," according to one commentator. See Eric W. Orts, *Reflexive Environmental Law*, 89 Nw. U. L. Rev. 1227, 1319 (1995).

246. "Approximately 500,000 tons of regulated medical waste are generated each year by about 380,000 generators, such as hospitals, clinic, and physicians' offices." Gerrard, *supra* note 244, at 21. The U.S. District Court for the District of Columbia has ordered the EPA to establish new source performance standards for medical waste incinerators for pollutants. See *Air Pollution: Time Sought by EPA to Reassess, Revamp Air Act Rule for Medical Waste Incinerators*, 26 Env't Reprtr. (BNA) 2331 (Apr. 12, 1996) (reporting EPA's attempt to delay court-ordered deadlines).

247. Not all of these chemical substances are regulated.

Approximately 80,000 chemicals are in commercial use today, and about 1,000 more are introduced each year. Only a few hundred chemicals and specified mixtures of chemicals are regulated under the hazardous waste laws. Of the remainder, only a small fraction have been thoroughly tested for toxicity, and there is no doubt that many chemicals outside the regulatory net pose serious hazards.

Gerrard, *supra* note 245, at 7 (citing Bruce W. Piasecki & Gary A. Davis, *America's Future in Toxic Waste Management: Lessons From Europe* 4 (1987)).

248. According to Jefferson and Gilpin Counties' district attorney, Donald Mielke, who testified before the Senate Subcommittee on Toxic Substances, "an environmental criminal could become the next mass murderer, even though the cancers, birth defects and other problems he causes may take years to appear." See Theodore M. Hammett & Joel Epstein, *U.S. Dept. of Justice: Local Prosecution of Environmental Crime* 7 (June 1993); see also Nancy L. Quackenbush, Comment, *The Personal Injury Endorsement: Breathing New Life into CGL Coverage for Pollution-Related Offenses*, 29 Gonz. L. Rev. 385 (1993-1994).

249. See Bruce W. Nelan, *Formula for Terror: The Former Soviet Arsenal Is Leaking into the West, Igniting Fears of a New Brand of Nuclear Horror*, Time, Aug. 29, 1994, at 47, 47.

250. The U.S. Congress and state legislatures have acted to require disclosure of environmental dangers in many cases. See, e.g., 42 U.S.C. § 9601 (1994); N.J. Stat. Ann. § 13:1K-6 (West 1991 &

## VIII. RECONCEPTUALIZING THE RULE

The likelihood is small that an attorney will encounter the nightmare scenario hypothesized at the beginning of this Article. Thus, the choice of the precise language stating the attorney's duty of confidentiality may be symbolic.<sup>251</sup> The legislative history of Rule 1.6 reports no debates of divergent views regarding the line drawn in particular fact settings.<sup>252</sup> Rather, the controversy centered on the "size of a discretionary zone"<sup>253</sup> for attorney decision-making. The ABA debate revealed varying degrees of aversion to the general concept of disclosure in the undefined, theoretical case—unencumbered by facts.<sup>254</sup>

The following discussion suggests a reassessment and reconceptualization of Model Rule 1.6, to accord weight to both risks inherent in the context of confidentiality (disclosure and silence). Four suggestions spring from the analysis presented in the body of this Article (though they require additional defense here): (1) the Rule must acknowledge the power of positive law and of duties that are broader than criminal law; (2) the exception should focus on the element of peril; (3) a normative standard should be used to state a viable exception endorsing attorney disclosure in circumstances of grave peril; and (4) the confidentiality rule must state its standard with as much clarity as possible.

A. *Acknowledgment of Positive Law*

As it now stands, Rule 1.6 ignores positive law. It makes no reference to the power of positive law (neither statutory mandates nor the common law). Although there can be little doubt that positive law takes precedence over the ethical rules, omitting mention of this fact impairs

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Supp. 1996); 35 Pa. Cons. Stat. Ann. § 6018.405 (West 1993); Tenn. Code Ann. §§ 868-212-106, 868-212-213 (Michie 1996).

251. As is noted in the Legislative History of the February 1983 Mid-Year Meeting, "The Model Code permitted a lawyer to reveal the intention of a client to commit any crime. There was no evidence that this provision had interfered with lawyer-client communication." *Legislative History*, *supra* note 13, at 49. Moreover, lawyers "only rarely have to choose between breaching a professional code and maintaining a morally questionable silence." Zacharias, *supra* note 1, at 353.

252. It is likely that, given specific facts, attorneys and legal scholars would agree on whether disclosure is necessary.

253. See 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:302, at 168.47-48 (Supp. 1996).

254. The divergent views may express competing perspectives regarding the competencies of the decision makers on the front line of this issue (practicing attorneys). See *id.* at 168.47.

the attorney's analysis and use of the *Model Rules* and may delay action in situations of peril.

### *B. The Element of Peril*

The exception for serious crimes is intended to protect the interest of third parties and the public from unreasonable risk of harm. It presents the break point at which the client's interest in secrecy is outweighed by the ultimate right of each individual to be free from unreasonable risk created by another. The exception for harm to another is based on the concept that the client's interest must give way when the countervailing interest is so significant.

But Rule 1.6 skews the inquiry relating to the third party's interest. It requires two elements: (1) significant peril to a third party (imminent death or substantial bodily harm); and (2) culpable conduct by the client (a criminal act). Only peril resulting from criminal conduct by the client justifies disclosure. Thus, under Rule 1.6, the attorney has no right to disclose a danger unless it is created by a criminal act.

Inclusion of the crime requirement in this test inserts a formalistic requirement that lacks a nexus with the protective purpose of the exception. It effectively blunts the test by diverting attention away from the element of concern: peril. Fraudulent or negligent conduct can kill a third party as readily as criminal conduct. Furthermore, negligent and intentional torts include consideration of culpability. Criminal law does not represent the full range of our responsibilities to one another. Moreover, the element of crime inserts uncertainty into the analysis, creating disparate results based not on how significant the harm to another may be, but rather on the fortuity of whether the legislature has foreseen the particular type of harm threatened and criminalized it.

A test for the exception that focuses on the peril to the third party (substantial bodily harm or death) creates a balance that is appropriate to the protected interest. It stops the reach of confidentiality "where the public peril begins."<sup>255</sup> It allows the balancing of interests consistent with tort principles and social utility. "Although the reasons for vigilant protection of client confidences are strong, these policy bases disappear

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255. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976). The peril in *Tarasoff* was not "public peril" in the sense of dangers to the public at large, rather, the "public" aspect of the peril arose from the cumulative interest of all persons in receiving the benefit of a warning. *Id.*

when the client seeks, not representation with respect to past acts (whether criminal or not), but rather to harm others in the future.”<sup>256</sup>

In the case of a domestic-Bhopal, under Rule 1.6 an attorney must not speak to prevent the harm if the peril arises from work practices that are merely negligent rather than criminal.<sup>257</sup> Of course, warning the client that the negligent acts are endangering others should be enough to convince him to alter the work practices. Assuming that the client persists in the same negligent practices, however, Rule 1.6 fails to provide a basis for revealing the dangers. The negligence might be deemed an intentional tort or may constitute reckless disregard, a basis for punitive damages. In the absence of a statute criminalizing the conduct, however, the reckless or intentional nature of the conduct does not render the conduct criminal—a necessary element to justify disclosure under the Rule. A similar result occurs with regard to fraud. Thus, Rule 1.6 creates a disjunction between the rules of ethics and common law duties.<sup>258</sup>

### C. *The Need for a Normative Standard*

If the legal profession is to remain self-regulated, it must recognize that, like other rights and duties, the duty of confidentiality is not an absolute. It must give way to protection of others in rare circumstances of peril. The ABA delegates, all lawyers of course, are accustomed to negotiating for the most protective language and the widest latitude in decision-making. Here, they designed a discretionary standard to provide leeway for attorneys and protection to clients. However, the standard fails to adequately assess the other interest in the balance: harm to third parties.<sup>259</sup>

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256. Aronson, *supra* note 55, at 832.

257. Some environmental statutes do deem conduct criminal while recognizing that the conduct would be merely negligent but for the statutory fiat. *See, e.g.*, 42 U.S.C. § 7413(c)(4) (1994) (criminalizing negligent release of listed hazardous air pollutants).

258. Common law, the traditional source of rights and duties, recognizes that negligent conduct is sufficiently culpable to support liability. The imposition of liability for negligence indicates a system of justice in which duties to others in society are broader than the duty to refrain from criminally proscribed conduct. *See* Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 Cornell L. Rev. 765 (1987) (noting tort law's goal of enforcing social norms).

259. Pressing the scope of confidentiality to the extreme may add fuel to the public perception that attorneys do not serve the goals of society. "We have seen too little evidence of professional as opposed to trade performance by the individual lawyer and no evidence of serious professional self-regulation toward diverting the profession to the pursuit of the common good—the public



Only a normative standard can protect this interest by creating a viable exception to the prohibition of Rule 1.6. The general rule stated in Rule 1.6 is mandatory. It prohibits disclosure. "A lawyer *shall not* reveal information relating to representation . . . ."<sup>260</sup> The normative message that the lawyer must not disclose client information is underscored by numerous statements in the comments, the Preamble, and the Scope statement.<sup>261</sup> By contrast, the limited exception for preventing harm to others is merely permissive: "A lawyer *may* reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act . . . ."<sup>262</sup> The interaction of these provisions, in conjunction with the momentum of the Rule discussed above, results in an exception without substance.<sup>263</sup> Social utility, however, demands a viable exception to the mandate of silence in extreme cases. This need can be seen most clearly in the context of environmental catastrophes.

Environmental catastrophes overwhelm the analysis of the Rule when the effect of a single hazardous event has imminent and dramatic destructive power.<sup>264</sup> Nuclear destruction and Bhopal-type disasters necessitate a normative standard. Like the benefit ascribed to the principle of confidentiality, their detriment is cumulative.<sup>265</sup> However, unlike the benefits, the cost of the detriment is far from theoretical. Given a high level of certainty that the disaster will occur absent preemptive action, the need to speak should trump the putative benefit of future attorney counseling. Hence, Rule 1.6 should employ a normative standard to encourage attorneys to avert harm in extreme cases.

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interest." F. Raymond Marks et al., *The Lawyer, The Public, and Professional Responsibility* 288 (1972) (charging profession with failing to provide pro bono services to needy).

260. *Model Rules of Professional Conduct* Rule 1.6 (1994) (emphasis added).

261. See, e.g., *Model Rules of Professional Conduct* pmb. para. 7 (1994); *Model Rules of Professional Conduct* Rule 1.6 cmts. 3, 12, 13.

262. *Model Rules of Professional Conduct* Rule 1.6 (emphasis added).

263. The use of a discretionary standard makes sense in a system where the attorney has significant discretion. Permissive disclosure rules have been praised as "afford[ing] lawyers latitude to deal with very difficult and often highly fact specific problems." Levin, *supra* note 178, at 101. This benefit can only occur, however, in a system that provides latitude for the attorney's decision.

264. "We now have a new environmental hazard to live with. We have a unique event here that could only happen in the chemical age." Lee Clarke, *Acceptable Risk?: Making Decisions in a Toxic Environment* 1 (1989) (quoting local health officer).

265. This summary assumes the validity of the cumulative future benefits of Rule 1.6 promised by the ABA's analysis.

*D. The Need for a Clear Statement*

Difficult judgment calls inhere in situations of peril. To maximize the likelihood of responsible judgments, the rule on confidentiality should provide useful guidelines for balancing the interests at issue rather than creating barriers to analysis. Rather than seeking to funnel the attorney's analysis to a conclusion or to insulate the attorney from judicial review, the Rule should incorporate the concepts of harm and risk developed by tort law. Indeterminacy will always be present. A normative standard declaring that the attorney "should" disclose a threat of imminent peril will not make the balancing process described by Rule 1.6 easy, but it will make it a genuine balancing process rather than a conclusion masquerading as an inquiry.

*E. Suggested Language*

The following language attempts to incorporate the principles discussed in this Article into the format of Rule 1.6:

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to comply with law or the order of a court.

(c) A lawyer should reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from creating peril to another or others that is likely to result in death or substantial bodily harm.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

The first exception's use of "must" with regard to other law is simply an acknowledgment of the "forced exception"<sup>266</sup> required by positive law. "[A] lawyer who is merely permitted to reveal must reveal when

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266. Hazard, Jr., *supra* note 40, at 1280 (using term more narrowly to describe situation in which attorney must "make some kind of self-protective disclosure" when client refuses to rectify fraud).

faced with a mandatory requirement of 'other' law."<sup>267</sup> The use of "should" in subsection (c) vests discretion in the decision maker (the attorney) in the case of possible peril. Under the *Model Rules*, this discretionary standard would provide no basis for disciplinary action.<sup>268</sup> But a mandatory rule with its threat of disciplinary action probably is not necessary to achieve the goal of encouraging disclosure of peril.<sup>269</sup> Moreover, a mandatory disclosure requirement would constrain the judgment of the attorney in an area where judgment is paramount.<sup>270</sup> With regard to the exception for attorney self-interest, the use of an openly permissive standard (signaled by the use of "may") is sufficient to protect the attorney decision-maker.<sup>271</sup>

## IX. CONCLUSION

Rule 1.6 is radically out of step with the realities of the modern world, including the real risk of environmental hazards. The philosophy of Rule 1.6 rests on two foundational assumptions about the attorney's role in society: first, that the transcendent benefits attending attorney confidentiality (full representation and counseling compliance with the law) outweigh the harms occasioned by silence; and second, that, as professionals, attorneys must prefer client interests over the interests of others. The modern potential for catastrophic harm challenges these assumptions. Certainly changes in social attitudes, political mandates, and physical threats have always required reevaluation of legal principles. Yet no change has presented so dramatic a need for

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267. 2 Hazard, Jr. & Hodes, *supra* note 34, § AP4:106, at 1266. "Legal principles outside the code thus convert 'may reveal' into 'must reveal.'" Hodes, *supra* note 129, at 760.

268. The Scope section of the *Model Rules* notes that disciplinary action should not be taken for actions within the bounds of attorney discretion. See *Model Rules of Professional Conduct* Scope para. 13 (1994). The Scope section clarifies this principle by stating: "Many of the Comments use the term 'should.' Comments do not add obligations to the Rules . . . ." *Model Rules of Professional Conduct* Scope para. 13.

269. "So long as lawyers are not *prohibited* from revealing the threat, moral duty will ordinarily convert 'may reveal' into 'must reveal.'" 2 Hazard, Jr. & Hodes, *supra* note 34, § AP4:104, at 1262 (Supp. 1994).

270. "[A]lthough some exceptions to absolute confidentiality are necessary, lawyers need not invoke them at the first opportunity. To the contrary, each lawyer should strive to observe the spirit of the general rule, and invoke an exception only when and to the extent it is truly necessary to do so." See 1 Hazard, Jr. & Hodes, *supra* note 34, § 1.6:109, at 168.2 (Supp. 1996).

271. The latest statement of the American Law Institute's standard for the lawyer's duty of confidentiality is set forth in Proposed Final Draft No. 1 of *Restatement (Third) of Law Governing Lawyers*. It allows attorneys to disclose information necessary for a claim or defense but rejects the other instances of attorney self-interest. *Restatement (Third) of Law Governing Lawyers* § 117A (Proposed Final Draft No. 1, 1996).

reevaluation as the advent of the destructive and hazardous forces now present in the modern world. Through legislation, both the federal and state governments have responded to the existence of nuclear, chemical, and other environmental hazards. The compelling interests that motivated these changes also justify reassessment of the legal profession's ethical rules, including Model Rule 1.6.

Despite its apparent conformity to the paradigm of general rule and exception, Rule 1.6 moves toward a categorical mandate of silence. Its flat prohibition joins with constrained exceptions and cautionary comments to produce a rule in which disclosure is never encouraged and hardly ever allowed. The momentum of the Rule does more than guide the attorney's professional judgment through basic principles.<sup>272</sup> It leads (or drives) the attorney inexorably toward the decision to remain silent, revealing both the strength of the Rule's preference for confidentiality and a lack of faith in the decision-maker (the practicing attorney).

Although attorneys often address dangers created by clients through moral dialogue with the client,<sup>273</sup> such moral dialogue may fail to alleviate dangers in the exceptional case. In such a case, the ethical rules of the profession should provide useful guidance to the attorney and should encourage real consideration of the threats presented by client conduct. As protection against improvident disclosure, Rule 1.6 should retain its strong prohibition against disclosure of client information. To protect against the corollary danger of improvident silence, the rule should provide a narrow but viable exception, encouraging attorneys to assess dangers to non-clients and to disclose information when such disclosure is necessary to prevent grave harm.

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272. This language is drawn from paragraph eight of the Preamble to the *Model Rules*.

273. Cf. Pepper, *supra* note 113, at 1609 (arguing that lawyer has "a presumptive moral obligation to engage in a counseling conversation if there is reason to foresee that the client may violate the law or a significant legal or moral norm").

